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No.

IN THE

Supreme Court of the United States

CHARLES FRANKLIN MURDOCH, JR.,

Petitioner,

v.

ROY CASTRO, WARDEN, AND
EDMUND G. BROWN, JR., ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA,

Respondents.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Harrington v. Richter* (No. 09-587), argued October 12, 2010, this Court requested that the parties brief and argue the question of whether AEDPA deference applies to a state court's summary disposition of a claim. Regardless of how this Court resolves *Richter*, Petitioner requests certiorari—whether to address a division of authority that likely will remain unresolved, or at least to summarily vacate and remand for further consideration.

Petitioner independently seeks certiorari with respect to the Ninth Circuit's holding, following Eighth Circuit cases, that this Court has opened the door to state law privileges trumping the Confrontation Clause of the Sixth Amendment. The questions are as follows:

1. Does AEDPA deference apply to a state court opinion addressing only the petitioner's state law claims, without mention of the petitioner's Federal law claims, including claims under the Confrontation Clause of the Sixth Amendment?

2. Did *Swidler & Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998), abrogate this Court's Confrontation Clause decisions holding that only an accuser's Fifth Amendment privilege against self-incrimination can bar cross-examination regarding matters relevant to the accuser's bias? If not, is Petitioner entitled to a writ of habeas corpus?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner Charles Franklin Murdoch, Jr. and Respondents Edmund G. Brown, Jr., Attorney General of the State of California, and Roy Castro, Warden. There are no corporate parties to this appeal.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

A. Murdoch's Conviction 3

B. State Appeals 6

C. Proceedings Below 7

REASONS FOR GRANTING THE PETITION 8

I. AEDPA DEFERENCE CANNOT APPLY WHERE CIRCUMSTANCES DEMONSTRATE THAT THE STATE COURT OVERLOOKED THE FEDERAL CLAIM 8

A. This Case Has Created a Circuit Split That Would Remain If the Court Rules for the State in *Richter* 8

B. The California Courts Overlooked Murdoch's Federal Claim 10

TABLE OF CONTENTS (Continued)

Page

C. If the Court Rules Against the State on "Silent Denial" Grounds in *Richter*, This Case Provides an Opportunity for a Broader Ruling 13

D. If the Court Rules More Broadly Against the State in *Richter*, Summary Relief on Certiorari Is Appropriate 15

II. ON THE MERITS, HABEAS RELIEF IS WARRANTED BECAUSE THE SUPERIOR COURT IMPROPERLY LIMITED MURDOCH'S CROSS-EXAMINATION OF HIS ACCUSER 16

A. This Court's Pre-1998 Precedents Do Not Permit State Law Exceptions to the Confrontation Clause 17

B. The Ninth Circuit Misread *Swidler* 20

C. Murdoch Is Entitled to a Writ of Habeas Corpus 25

CONCLUSION 28

APPENDIX

United States Court of Appeals for the Ninth Circuit, Plurality Opinion (Tashima, J.), dated June 21, 2010 ..... App. 1

United States Court of Appeals for the Ninth Circuit, Concurring Opinion (Silverman, J.), dated June 21, 2010 ..... App. 29

TABLE OF CONTENTS (Continued)

Page

United States Court of Appeals for the Ninth Circuit, Dissenting Opinion (Kozinski, C.J.), dated June 21, 2010 ..... App. 31

United States Court of Appeals for the Ninth Circuit, Dissenting Opinion (Thomas, J.), dated June 21, 2010 ..... App. 68

United States District Court for the Central District of California, Report and Recommendation, dated March 7, 2005 ..... App. 69

United States District Court for the Central District of California, Order Adopting Report and Recommendation, dated April 7, 2005 ..... App. 96

Court of Appeal of the State of California, Opinion, dated March 26, 1998 ..... App. 98

Supreme Court of California, Order, dated July 8, 1998 ..... App. 135

TABLE OF AUTHORITIES

Page

CASES

Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624 (1931) 17, 18

Bockting v. Bayer, 399 F.3d 1010 (9th Cir. 2005) ... 23

Brookhart v. Janis, 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966) 26

Canaan v. McBride, 395 F.3d 376 (7th Cir. 2005) 8

Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) 21

Chadwick v. Janecka, 312 F.3d 597 (3d Cir. 2002) 9, 15

Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) 19

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) 23

Danner v. Kentucky, 525 U.S. 1010, 119 S. Ct. 529, 142 L. Ed. 2d 439 (1998) 8, 9

Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) .....passim

Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) 19, 26, 28

Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965) 17

TABLE OF AUTHORITIES (Continued)

Page

Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) 22

Johnson v. Norris, 537 F.3d 840 (8th Cir. 2008) 22

Lyell v. Renico, 470 F.3d 1177 (6th Cir. 2006) 8

Newton v. Kemna, 354 F.3d 776 (8th Cir. 2004) 22

Norde v. Keane, 294 F.3d 401 (2d Cir. 2002) 9

Olden v. Kentucky, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988) 19

Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) 21, 22

People v. Mincey, 827 P.2d 388 (Cal. 1992) 11

People v. Williams, 98 Cal. Rptr. 3d 770 (Ct. App. 2009) 11

Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) 12

Shelton v. Purkett, 563 F.3d 404 (8th Cir. 2009) 8

Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968) ..... passim

Swidler & Berlin v. United States, 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998) ..... passim

TABLE OF AUTHORITIES (Continued)

Page

Vela v. Superior Court, 255 Cal. Rptr. 921 (Ct. App. 1989) 11, 12

Weeks v. Angelone, 528 U.S. 225, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000) 15

Whorton v. Bockting, 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007) 23

Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) 12

Williams v. Taylor, 529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) 9

Ylst v. Nunnemaker, 501 U.S. 797, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991) 10

STATUTES AND RULES

28 U.S.C. § 1254 1

28 U.S.C. § 2254 ..... passim

Cal. Evid. Code §§ 1035 to 1038.2 24

Cal. R. Ct., Rule 8.1115 11

Fed. R. Evid. 501 20

OTHER AUTHORITIES

Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 Hastings L.J. 1235 (May 2004) 11

Charles Alan Wright et al., 23 Fed. Prac. & Proc. Evid. §§ 5426 to 5431 (supp. 2010) 24

PETITION FOR CERTIORARI

Charles Franklin Murdoch, Jr. respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit.

OPINIONS BELOW

The plurality, concurring, and two dissenting opinions of the *en banc* Ninth Circuit are reported at 609 F.3d 983 (*Murdoch III*) and reprinted herein at App. 1, 29, 31, and 68. The 2004 panel opinion of the Ninth Circuit is reported at 365 F.3d 699 (*Murdoch I*). The 2007 panel decision of the Ninth Circuit is reported at 489 F.3d 1063 (*Murdoch II*). The 2008 order granting *en banc* rehearing is reported at 546 F.3d 1051. The pertinent District Court opinion and order are unreported and reprinted herein at App. 69 and App. 96.

Also reprinted herein are the March 26, 1998 unreported opinion of the California Court of Appeal denying Murdoch's appeal and petition (App. 98) and the July 8, 1998 order of the California Supreme Court denying review (App. 135).

JURISDICTION

The Ninth Circuit issued its *en banc* decision on June 21, 2010. On August 17, 2010, this Court (KENNEDY, J.) extended until October 19, 2010 the time for Murdoch to petition for certiorari. Murdoch invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

The Supremacy Clause of Article VI provides that the "Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

The Ninth Circuit has split from at least four other Circuits, becoming the first to find that a reasoned state court opinion, which overlooks rather than decides a Federal claim, is entitled to AEDPA deference. Such a ruling has no grounding in the language of AEDPA or in the principles of federalism underlying that statute. The Court should grant certiorari to resolve this division of authority.

On the merits, the Ninth Circuit, joining the Eighth Circuit, read this Court's 1998 decision in *Swidler* as opening the door to state law privileges trumping the Federal right to cross-examine one's accuser on subjects relevant to impeachment. Under this reasoning, AEDPA gives state courts virtually unchecked discretion to invoke state law privileges to limit cross-examination of an accuser. The Eighth and Ninth Circuits misread *Swidler*, a non-constitutional decision, and are irreconcilable with this Court's Confrontation Clause decisions and the Supremacy Clause. Federalism means that Federal courts must give due respect to state courts; it does not mean that state law preempts Federal rights.

As set forth in this petition, Murdoch is entitled to a writ of habeas corpus and a new trial.

A. Murdoch's Conviction

On May 17, 1983, four men robbed the Horseshoe Bar in Long Beach, California. During the course of the robbery, one bystander was shot and killed; another was stabbed and severely wounded. The robbers left behind a fingerprint. The crime went

unsolved until 11 years later, when advances in fingerprint technology enabled police to identify Dino Dinardo as one of the perpetrators.

Officers arrested Dinardo on June 30, 1994. Dinardo initially denied any involvement in the crime, but he later recanted and admitted his involvement. He identified Murdoch as one of his accomplices. The State charged both Dinardo and Murdoch with murder in the Los Angeles County Superior Court.

The State tried Dinardo first. At a suppression hearing, Dinardo tes tified that his confession had been coerced, and that he had given the confession in exchange for a promise that he would be released to see his wife and daughter. Dinardo was convicted and was sentenced to imprisonment of 25 years to life.

At sentencing, the Superior Court expressed doubt that the State could convict Murdoch without Dinardo's testimony, while noting the court's discretion to reduce Dinardo's sentence. In return for Dinardo's agreement to testify against Murdoch, Dinardo received a reduction of his conviction to voluntary manslaughter and a reduced sentence of 12 years' imprisonment.

Dinardo was a key witness at Murdoch's trial. He testified that he and Murdoch, together with two other men, robbed the Horseshoe Bar. According to Dinardo, Murdoch carried a .22 caliber rifle and announced, "This is a stick up." While Dinardo was fumbling with the buttons on the cash register, he heard a gunshot, emptied the register, and ran out

the back door, joining the other two men in the getaway car, with Murdoch joining them about a minute later. Dinardo recalled seeing Murdoch in possession of the rifle both in the bar and in the car.

During trial, the prosecutor informed the Superior Court of the existence of a letter from Dinardo to his former counsel stating that the police coerced him into implicating Murdoch in the crime. That letter (as the record in this action reveals) stated approximately as follows:

> I would like to make a statement about the facts surrounding my arrest for robbery and murder. I was taking care of my young daughter when Long Beach police arrested me at my home in Berkeley. Two policemen, Detective Pavek and his partner, took me to the Berkeley Police Department and interviewed me. I wanted to get back to my daughter as I worried about her welfare. At that time, Detective Pavek coerced a statement from me and promised not to charge me if I made a statement that Charles Murdoch participated in the crime. But, I do not actually know Mr. Murdoch, although I know his brother. Mr. Murdoch and I did not commit any crime.

Upon objection by Dinardo's then-counsel, the Superior Court concluded that the letter was protected by the attorney-client privilege, and it ruled that Murdoch could not use the letter to

impeach Dinardo on cross-examination. Murdoch was convicted of first-degree murder and received a sentence of life imprisonment without parole.

B. State Appeals

Murdoch filed a direct appeal to the California Second District Court of Appeal and also filed a habeas corpus petition with the same court. His brief raised eleven arguments. The first ten were objections under California law. The eleventh raised objections under the United States Constitution:

> XI. EVEN IF DINARDO'S LETTER WERE PRIVILEGED, APPELLANT'S 5TH AND 6TH AMENDMENT RIGHTS TO A FAIR TRIAL AND TO CONFRONT AND CROSS-EXAMINE THE CHIEF WITNESS AGAINST HIM WOULD TAKE PRECEDENCE OVER DINARDO'S ATTORNEY-CLIENT PRIVILEGE UNDER THE PARTICULAR FACTS OF THIS CASE

On March 26, 1998, the Court of Appeal denied Murdoch's direct appeal and habeas petition in a 26-page unpublished opinion. The opinion thoroughly addressed Murdoch's ten state law claims.

But the Court of Appeal counted only to ten, not eleven. It never mentioned Murdoch's Federal claim or the Sixth Amendment. App. 105-133. The Court of Appeal affirmed Murdoch's life sentence.

Murdoch petitioned to the California Supreme Court, which summarily denied review on July 8, 1998. App. 135.

C. Proceedings Below

On July 6, 1999, Murdoch petitioned the United States District Court for the Central District of California for a writ of habeas corpus. The District Court denied the petition on March 7, 2002.

On April 5, 2004, the Ninth Circuit held in *Murdoch I* that AEDPA deference did not apply. It vacated and remanded with instructions for the District Court to obtain Dinardo's letter and to review Murdoch's Confrontation Clause claim on the merits.

The District Court, finding that the constitutional error was harmless, again denied the petition on April 7, 2005. App. 96. On June 12, 2007, a divided three-judge panel of the Ninth Circuit affirmed in *Murdoch II*.

On October 9, 2008, the Ninth Circuit granted Murdoch's petition for rehearing *en banc*. On June 21, 2010, in *Murdoch III*, a divided 11-judge Ninth Circuit panel overruled *Murdoch I*, held that AEDPA deference applied, and affirmed the denial of the writ.

REASONS FOR GRANTING THE PETITION

I. AEDPA DEFERENCE CANNOT APPLY WHERE CIRCUMSTANCES DEMONSTRATE THAT THE STATE COURT OVERLOOKED THE FEDERAL CLAIM

A. This Case Has Created a Circuit Split That Would Remain If the Court Rules for the State in *Richter*

The Ninth Circuit has "become the only court in the country to hold that a state court may adjudicate a constitutional claim 'on the merits' by overlooking it, and then have its carelessness rewarded with AEDPA's presumption that its adjudication was good enough for government work." App. 60 (Kozinski, C.J., dissenting).

It is not unusual for a state court to issue a reasoned decision that fails to mention a Federal constitutional challenge. *See, e.g., Danner v. Kentucky*, 525 U.S. 1010, 119 S. Ct. 529, 529, 142 L. Ed. 2d 439 (1998) (SCALIA, J., dissenting from denial of certiorari) ("Although petitioner objected that this procedure violated his constitutional right to confront his accuser, neither the trial court nor the [Kentucky] Supreme Court so much as mentioned the Sixth Amendment.").

Until this case, the authorities were unanimous that AEDPA deference is not warranted in such a situation. *Shelton v. Purkett*, 563 F.3d 404, 409 (8th Cir. 2009); *Lyell v. Renico*, 470 F.3d 1177, 1182 (6th Cir. 2006); *Canaan v. McBride*, 395 F.3d 376, 382

(7th Cir. 2005); *Norde v. Keane*, 294 F.3d 401, 410 (2d Cir. 2002).

This division of authority would not disappear if the Court were to hold in *Richter* that summary dispositions are adjudications on the merits. Even in the Circuits that afford AEDPA deference to summary adjudications, *de novo* review "govern[s] when the opinion of a state court reveals that it did not adjudicate a claim." *Chadwick v. Janecka*, 312 F.3d 597, 606 (3d Cir. 2002) (Alito, J.).

Although, for instance, the Second Circuit generally defers to summary dispositions, it applies a multi-factor test to determine whether in a particular case the petitioner can establish that the Federal claim was not in fact adjudicated on the merits. *Norde*, 294 F.3d at 410. A reasoned decision addressing only the petitioner's state law challenges, not his Federal claims, satisfies that burden. *Id.*

Such a distinction makes sense. In *Richter*, the State and supporting *amici* offer the federalism-based argument that State courts lack the time and resources to issue a reasoned opinion in every case. But these considerations do not apply where—as in *Danner*, *Shelton*, *Lyell*, *Canaan*, *Norde*, and this case—the state court already took the time to reduce its reasoning to a written opinion, which establishes that the court overlooked the Federal claim.

"AEDPA's purpose [is] to further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) (KENNEDY, J.). AEDPA therefore ensures that state courts are the primary forum for

determining whether a state prosecution comported with Federal law. *Id.* at 437-38. Where the petitioner can establish that the state court failed even to consider his Federal claim, it means that the state court offered no forum at all.

B. The California Courts Overlooked Murdoch's Federal Claim

Unlike in *Richter*, which involved only an unreasoned summary order, the record in this case demonstrates the California courts' reasoning. The petitioner in *Richter* originally filed his habeas petition with the California Supreme Court, which issued only the one-page summary order. By contrast, Murdoch originally petitioned the California Court of Appeal, which issued a 26-page opinion. Although the California Supreme Court did not explain its denial of review, there is a rebuttable presumption that the California Supreme Court followed the reasoning of the opinion below. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991) (SCALIA, J.). This presumption "looks through" to the "last reasoned decision" of the California courts. *Id.* at 804. The deference analysis therefore turns on whether the Court of Appeal adjudicated Murdoch's Federal claim on the merits.

The Court of Appeal's 26-page opinion addressed only Murdoch's state law claims on the merits. The Ninth Circuit plurality conceded that the Court of Appeal "did not mention the Confrontation Clause in its opinion." App. 16. All it found was a discussion and quote "from the section of Murdoch's brief in

which he raised the issue," and a citation to a case that "dealt with the tension between the attorney-client privilege and the Confrontation Clause." *Id.* But the California Court of Appeal analyzed those arguments and authorities only as they related to state law privilege issues. App. 117-123. There was not even a boilerplate "catch-all" line to the effect of "we have considered Murdoch's other arguments and reject them." App. 38, 134.

As Judge Kozinski's dissent establishes, the explanation for the Court of Appeal's failure to sustain Murdoch's Confrontation Clause objection is clear. It was an oversight.[1] Murdoch cited precedents of the Supreme Court and the Second District Court of Appeal unambiguously holding that the attorney-client privilege must yield to the Confrontation Clause if the material is probative of bias, including the witness's belief that his or her testimony will result in a lenient sentence. *People v. Mincey*, 827 P.2d 388, 422 (Cal. 1992) (collecting authorities); *Vela v. Superior Court*, 255 Cal. Rptr. 921, 926 (Ct. App. 1989). This Confrontation Clause claim was Murdoch's eleventh enumerated

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[1] It is not surprising that an unpublished opinion might miss a winning argument. "[U]npublished opinions are rather hastily prepared, by law clerks or staff attorneys, with little oversight by judges, and without attention to careful wording or possible future implications." Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 Hastings L.J. 1235, 1302 (May 2004). California courts go so far as to prohibit citation of unpublished Court of Appeal opinions, except in narrow circumstances. Cal. R. Ct., Rule 8.1115. "[P]ersistent use of unpublished authority may be cause for sanctions." *People v. Williams*, 98 Cal. Rptr. 3d 770, 777 (Ct. App. 2009).

argument, but the Court of Appeal addressed only the first ten arguments.

The Ninth Circuit plurality scoffed at the notion that the California courts overlooked Murdoch's Confrontation Clause argument. But it did not (and could not) identify any principled basis on which the Court of Appeal could have rejected that claim. By the plurality's reasoning, the case to create ambiguity in this Court's Confrontation Clause jurisprudence was *Swidler*. *Post* § II. But this Court issued *Swidler* on June 25, 1998. *Swidler* postdated the Court of Appeal's March 1998 opinion. Particularly in view of the California decisions in *Mincey* and *Vela*, it is difficult to construct a pre-June 1998 argument against Murdoch's Sixth Amendment challenge.

Rather than construct such an argument, the Ninth Circuit plurality found it irrelevant whether the California courts overlooked Murdoch's arguments. It reasoned that the non-deferential *de novo* standard of review, set forth in *Rompilla v. Beard*, 545 U.S. 374, 390, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005), and *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), applies only where a state court expressly and intentionally declines to reach a claim. App. 19-21.

This distinction lacks substance or principle. Section 2254(d) grants deference where the claim "was adjudicated on the merits in State court proceedings." It tortures this statutory language to equate an oversight with adjudication on the merits. Such an oversight, just like the intentional omissions

at issue in *Rompilla* and *Beard*, is a failure to adjudicate a claim on the merits. The Second, Sixth, Seventh, and Eighth Circuits have recognized this fact. But the Ninth Circuit has made a new and unjustified departure from the statute and this Court's decisions.

Thus, even if the Court rules for the State in *Richter*, this Court should grant certiorari to resolve the division of authority that this case implicates.

C. If the Court Rules Against the State on "Silent Denial" Grounds in *Richter*, This Case Provides an Opportunity for a Broader Ruling

The Court recognizes the need to clarify when a claim was "adjudicated on the merits in State court proceedings" under § 2254(d). In *Harrington v. Richter*, 130 S. Ct. 1506, 176 L. Ed. 2d 108 (2010), this Court *sua sponte* directed the parties to "brief and argue the following question: Does AEDPA deference apply to a state court's summary disposition of a claim . . . ?" *Id.* at 1506-07.

The Respondent's principal argument in *Richter* is that California law recognizes four types of summary adjudications, and that the particular type at issue—a "silent denial," which occurs when a majority of justices vote to deny the petition but cannot agree whether the denial is on the merits or on procedural grounds—is not an adjudication on the merits. If the Court decides *Richter* on this narrow ground, certiorari will be necessary to address the AEDPA deference issue in other contexts.

In such an event, this case would provide an opportunity for the Court to issue a broader ruling. At first blush, a case involving a 26-page state-court opinion may not seem a good candidate for a ruling on whether summary opinions are entitled to deference. But, in granting deference in this case, the Ninth Circuit treated the absence of analysis of the Federal claim as a summary adjudication of that claim: "[W]hen there is no reasoned state court opinion explaining the denial of a defendant's claim in any respect, we must assume that the state court has decided all the issues and perform an independent review of the record to ascertain whether the state court decision was objectively reasonable." App. 16.

This case highlights a fact strongly weighing against AEDPA deference to summary dispositions: judges are human beings who sometimes overlook meritorious arguments. *Ante* § I.A. In such a case, the state court has not served its AEDPA role as the primary forum for constitutional challenges. Cases like Murdoch's, unlike cases involving one-page orders, allow the petitioners to pull back the curtain to reveal this unfortunate fact.

Perhaps the Court ultimately will find that, on balance, the asserted benefits of deferring to summary dispositions outweigh the costs. At the very least, however, the Court should decide this issue in a case that highlights the cost to individual petitioners like Murdoch, whose constitutional claims went unheard.

D. If the Court Rules More Broadly Against the State in *Richter*, Summary Relief on Certiorari Is Appropriate

Alternatively, the Court could rule in *Richter* that AEDPA deference requires, at a minimum, that the state court identified the Federal claim (by name or by numbered argument) and indicated that it was rejecting the Federal claim on the merits. *Chadwick*, 312 F.3d at 606 (Alito, J.) (discussing *Weeks v. Angelone*, 528 U.S. 225, 231, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000)). Or the Court could rule even more broadly that AEDPA deference requires some explanation of the state court's rationale.

In either event, the Ninth Circuit erred in affording deference to the California Court of Appeal's opinion, which did not mention Murdoch's Federal claim by name (Confrontation Clause) or number (argument number 11). The Court could therefore enter a summary "GVR" order, granting certiorari, vacating the decision below, and remanding with instructions for the Ninth Circuit to reconsider its *en banc* opinion in view of *Richter*. The plurality expressly ruled on the merits of Murdoch's Confrontation Clause claim solely under the highly deferential AEDPA standard and made no alternative holding as to how it would rule on *de novo* review. App. 28.

Murdoch urges the Court, however, to grant certiorari to address the merits of his Confrontation Clause claim. As set forth in the next section, that issue independently merits certiorari.

II. ON THE MERITS, HABEAS RELIEF IS WARRANTED BECAUSE THE SUPERIOR COURT IMPROPERLY LIMITED MURDOCH'S CROSS-EXAMINATION OF HIS ACCUSER

The Court separately can and should grant certiorari on Murdoch's substantive constitutional challenge: that the Superior Court violated Murdoch's Confrontation Clause rights by barring him from questioning Dinardo regarding the exculpatory letter.

Because the Court of Appeal failed to adjudicate this claim on the merits, § 2254(d) is inapplicable, and *de novo* review applies. *Supra* § I. But even if this Court were to hold that AEDPA deference applies, the California Court of Appeal's denial of relief nevertheless contravened, and involved an unreasonable application of, this Court's precedents.

Since first holding that the Confrontation Clause binds the states, this Court has consistently held that a trial court cannot bar inquiry into relevant subjects of impeachment of an accuser, except to protect another Federal right, the privilege against self-incrimination. The Court has rejected state law exceptions to this rule.

But the Ninth Circuit has taken a different, dangerous approach. Endorsing Eighth Circuit decisions, the plurality held that AEDPA permits any state law privilege to trump the Confrontation Clause until this Court expressly rules otherwise—so long as the state can offer a "principled argument" for why the privilege is more important than the specific privileges at issue in this Court's precedents.

For the purposes of the Supremacy Clause, however, all state law privileges are created equally. If in conflict with a Federal constitutional right, state law must yield. The Court should grant certiorari to preserve the Supremacy Clause and the Confrontation Clause in state prosecutions.

A. This Court's Pre-1998 Precedents Do Not Permit State Law Exceptions to the Confrontation Clause

This Court first applied the Confrontation Clause to the states in 1965. *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965). Shortly thereafter, the Court reversed the conviction of a defendant who "was denied the right to ask the principal prosecution witness either his name or where he lived, although the witness admitted that the name he had first given was false." *Smith v. Illinois*, 390 U.S. 129, 131, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968). "'It is the essence of a fair trial that reasonable latitude be given the cross-examiner.'" *Id.* at 132 (quoting *Alford v. United States*, 282 U.S. 687, 692, 51 S. Ct. 218, 75 L. Ed. 624 (1931)). "'Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.'" *Id.* (quoting *Alford*, 282 U.S. at 692).

Smith recognized only three restrictions that a trial court could place on cross-examination of an accuser. First, a trial court must protect the accuser's own properly invoked Fifth Amendment privilege against self-incrimination. Second, a trial

court can prohibit cross-examination on irrelevant subjects—that is, questions that merely harass, annoy, or humiliate the witness. Third, within these bounds, a trial court has discretion to determine the manner of questioning, including discretion to decide when defense counsel has exhausted questioning on a relevant subject. *Smith*, 390 U.S. at 132-33 (quoting *Alford*, 282 U.S. at 694).

Since the 1960s, then, this Court's Confrontation Clause precedents have directed that "'no obligation is imposed on the [state] . . . to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked.'" *Smith*, 390 U.S. at 132-33 (quoting *Alford*, 282 U.S. at 694).

In 1974, this Court rejected a proposed Confrontation Clause exception for Alaska's statutory privilege for juvenile convictions. In *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), the trial court had granted a protective order precluding the defense from questioning the key prosecution eyewitness regarding a juvenile conviction for burglary. This protective order violated the Confrontation Clause, under which "the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." *Id.* at 316. Notwithstanding the state's interest in protecting juveniles, this Court reiterated that the Fifth Amendment privilege

against self-incrimination was the only basis for barring inquiry into a relevant subject matter on cross-examination of an accuser. *Id.* at 320 (citing *Alford*, 282 U.S. at 694).

This Court has never retreated from *Smith* and *Davis* or recognized additional exceptions (much less state law exceptions) to the right of the accused to cross-examine his accuser on relevant subjects. Rather, the Court has rejected various subject-matter restrictions on cross-examination of accusers. *Olden v. Kentucky*, 488 U.S. 227, 232, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988) (potential that revealing accuser's "interracial relationship would prejudice the jury against her" did not fall within "reasonable limits on defense counsel's inquiry into the potential bias of a prosecution," where testimony on that subject matter directly attacked accuser's credibility); *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) ("the trial court prohibited all inquiry into the possibility that [the accuser] would be biased as a result of the State's dismissal of his pending public drunkenness charge"); *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (Confrontation Clause preempted "Mississippi common-law rule that a party may not impeach his own witness").

The Ninth Circuit, after holding that § 2254(d) applied to this case, denied relief because the "relationship between the Confrontation Clause and the attorney-client privilege has not been clearly established by the Supreme Court." App. 27. This

reasoning is backwards. The precedents of this Court were clear in 1998, and remain clear, that the only recognized exception to the Confrontation Clause is another Federal constitutional right, the Fifth Amendment privilege against self-incrimination.

B. The Ninth Circuit Misread *Swidler*

Notwithstanding the Supremacy Clause and this Court's precedents, the Ninth Circuit held that a state law privilege could trump Murdoch's rights under the Confrontation Clause. This misconception stems from a misreading of *Swidler & Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998).

Swidler had nothing to do with the Confrontation Clause. Rather, *Swidler* involved a motion to quash a grand jury subpoena, directed to a law firm, seeking privileged materials relevant to the investigation of firings at the White House Travel Office. The Court held that the attorney-client privilege under Fed. R. Evid. 501 survived the suicide of the firm's client, thus preventing disclosure of notes of conversations with the client regarding the firings. 524 U.S. at 401. In a footnote, the Court noted that the law firm, "while opposing wholesale abrogation of the privilege in criminal cases, concede[d] that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege." *Id.* at 409 n.3. But the Court declined to "reach this issue, since such exceptional circumstances clearly are not presented here." *Id.*

Thus, both the petitioners and the respondent in *Swidler* agreed that the notes might have been discoverable if a criminal defendant's constitutional rights were at stake. By its footnote, the Court merely cautioned that it was not deciding anything with respect to the application of privilege if and when the grand-jury investigation resulted in indictments and trials. Such *dicta* plays no part in the AEDPA analysis. *Carey v. Musladin*, 549 U.S. 70, 74, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). Nothing in this cautionary footnote suggests that the Court was revisiting three decades of Confrontation Clause jurisprudence.

Swidler's holding as to pre-indictment subpoenas necessarily had no bearing on the Court's precedents regarding cross-examination at trial. "The opinions of this Court show that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 52, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) (emphasis in original). "The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." *Id.* at 53. In *Ritchie*, the Court contrasted *Davis* with its decisions rejecting Confrontation Clause claims predicated on a witness' inability to remember key testimony, or on the failure to disclose certain items that could have been used in cross-examination. *Id.* at 53-54 & n.10. Such authorities were in "full accord with our earlier decisions that have upheld a

Confrontation Clause infringement claim on this issue only when there was a specific statutory or court-imposed restriction at trial on the scope of questioning." *Id.* at 53-54.

Murdoch's objection involves a "court-imposed restriction at trial on the scope of questioning," *id.*, not matters of pretrial disclosure. Here, the State disclosed the existence of Dinardo's letter stating that he was coerced into identifying Murdoch. Once the State called Dinardo as a witness, due process required the State to make such a disclosure. *Giglio v. United States*, 405 U.S. 150, 153-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). The Superior Court wrongly prevented Murdoch, once he knew of the letter, from using it to cross-examine Dinardo. This objection falls squarely within the Court's established Sixth Amendment case law. *Ritchie*, 480 U.S. at 52.

Unfortunately, the Ninth Circuit missed this distinction between pretrial disclosure and mid-trial restrictions on cross-examination. This misconception finds it root in decisions of the Eighth Circuit misreading the non-constitutional decision in *Swidler* as inviting new exceptions to the Confrontation Clause. *See Johnson v. Norris*, 537 F.3d 840, 846-47 (8th Cir. 2008); *Newton v. Kemna*, 354 F.3d 776, 781-82 (8th Cir. 2004). According to the Eighth Circuit, footnote 3 of *Swidler* opened the question of whether *Davis* permits an exception to the attorney-client privilege. The Ninth Circuit followed these Eighth Circuit decisions and held that Murdoch's constitutional claim necessarily presented

an "open question" barring relief under AEDPA. App. 24.

Certiorari is important not just to reverse the Ninth Circuit's misreading of *Swidler* but to abrogate the even-more-pernicious Eighth Circuit decisions. Those decisions involved the physician-patient privilege and the psychotherapist-patient privilege, not the attorney-client privilege. By extension of its misreading of *Swidler*, the Eighth Circuit has held that AEDPA bars review of state court orders regarding *any* state law privilege, except where the Court has specifically rejected that privilege as a Confrontation Clause exception—that is, the juvenile-records privilege and perhaps the marital privilege.[2] *Id. See* App. 26.

AEDPA would thus preclude Confrontation Clause challenges regarding any number of state law privileges—including communications with clergy, accountants, journalists, social workers, researchers, banking regulators, guardians ad litem, marriage counselors, and nurses—not to mention California

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[2] The marital privilege was at issue in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Although the plurality and the dissents in this appeal reference *Crawford*, Murdoch does not (and need not) rely on *Crawford*. Briefing in this appeal took place in 2006, after the Ninth Circuit determined that *Crawford* applied retroactively, but before this Court held that *Crawford* applied only prospectively. *See Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005), *rev'd sub nom., Whorton v. Bockting*, 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007). *Davis*, *Smith*, and this Court's other pre-1998 decisions are more than sufficient to warrant habeas relief under any standard.

privileges for communications with sexual assault counselors, domestic violence counselors, and human trafficking caseworkers. *See* Charles Alan Wright et al., 23 Fed. Prac. & Proc. Evid. §§ 5426 to 5431 (supp. 2010); Cal. Evid. Code §§ 1035 to 1038.2. By this rationale, if a state enacted a privilege for communications with veterinarians, judges in that state could limit cross-examination of pet-owners until this Court specifically decided otherwise.

The Ninth Circuit did not sweep quite as broadly as the Eighth Circuit, finding it sufficient that the "state court could have found a principled reason" that the attorney-client privilege was worthier of protection than the juvenile records privilege or the marital privilege. App. 26. But, by extension, AEDPA would mandate deference if the State offered a "principled reason" why, for instance, its unique "sexual assault counselor" privilege was similarly worthy of heightened protection in sexual assault prosecutions.

These Eighth and Ninth Circuit decisions threaten virtually any habeas challenge to a state law conviction, no matter how clear the violation. A clever prosecutor would need only to scour the case law—including, as here, precedents having nothing to do with the constitutional provision at issue—to manufacture ambiguity in this Court's precedents, and then argue that AEDPA barred review until this Court rejected that claim.

This Court should grant certiorari to correct the Eighth and Ninth Circuits' plain misreading of *Swidler*. *Cf. Marx v. Texas*, 528 U.S. 1034, 120 S.

Ct. 574, 575, 145 L. Ed. 2d 436 (1999) (SCALIA, J., dissenting from denial of certiorari) ("I do not think the Court should ever depart from the plain meaning of the Bill of Rights. But when it does take such a step into the dark it has an obligation, it seems to me, to clarify as soon as possible the extent of its permitted departure."). These holdings are not merely wrong, but dangerously wrong. This Court's Confrontation Clause precedents recognize only the Fifth Amendment privilege against self-incrimination, not any state law privilege, as a bar to cross-examination on matters relevant to the accuser's bias or lack of credibility.

C. Murdoch Is Entitled to a Writ of Habeas Corpus

If this Court agrees that the Ninth Circuit misread *Swidler* and this Court's Confrontation Clause decisions, the inquiry circles back to the question originally at issue in this appeal: whether Murdoch is entitled to a writ of habeas corpus vacating his conviction.

Murdoch respectfully urges this Court to reverse outright, as Judge Kozinski would have held, and to direct the District Court to issue the requested writ of habeas corpus. Murdoch filed his original petition 11 years ago, in 1999. It was not until five years later that the Ninth Circuit originally remanded in *Murdoch I*. When Murdoch appealed again in 2005, it took another five years for the Ninth Circuit to deny relief in *Murdoch II*, to vacate that decision on petition for rehearing, and then to issue an *en banc* opinion revisiting and reversing *Murdoch I*.

The record is fully developed and establishes Murdoch's entitlement to long-delayed relief. *Davis* held that the accused's lost opportunity to use evidence of a juvenile criminal record to impeach his accuser's general credibility was "'constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" 415 U.S. at 318 (quoting *Smith*, 390 U.S. at 131 (quoting *Brookhart v. Janis*, 384 U.S. 1, 3, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966))). *Smith* found such "first magnitude" error where a trial court barred cross-examination regarding the accuser's real name. 390 U.S. at 131. "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Van Arsdall*, 475 U.S. at 684 (error not harmless where court prohibited cross-examination regarding dismissal of public drunkenness charge).

This case involves even starker prejudicial error, with the prohibited examination involving a letter directly contradicting the chief accuser's inculpatory testimony. The District Court determined in this case that the error was harmless because the privileged letter was not credible and contrary to the testimony of some of Murdoch's own witnesses. It further noted, as did the Ninth Circuit plurality, that Murdoch had the opportunity to cross-examine Dinardo's account of the crime, even though Murdoch could not ask whether Dinardo previously gave a different account.

These holdings miss that "forcing a witness to confront and explain his prior statements that contradict his testimony is the gold standard for effective cross-examination." App. 46 (Kozinski, C.J., dissenting) (collecting authorities). Even accepting for the sake of argument that the privileged letter was not credible, the letter still opened the door for the classic impeachment of "Were you lying then, or are you lying now?"

There is no dispute that Dinardo was a key witness against Murdoch. App. 5-6. The forensic evidence implicated Dinardo, not Murdoch. App. 4. One eyewitness, the bartender, identified Murdoch, but that identification came 11 years after the crime. App. 7.

It was one thing for Dinardo to admit on the stand that he would have done "whatever it took" to reduce his sentence, and that he had previously lied to protect himself. But it would have been another thing entirely for Murdoch to confront Dinardo with a prior statement that Dinardo was coerced into identifying Murdoch. App. 5, 25.

At best, the State has arguments for why the letter would not have doomed its case against Murdoch. But that speculation cannot establish harmlessness beyond reasonable doubt, particularly not as this Court has applied that standard in *Davis*, *Smith*, and *Van Arsdall*.

Murdoch is serving a life sentence, without possibility of parole, after the Superior Court allowed him to confront his accuser only with one hand tied behind his back. Murdoch asks the Court

to reverse the judgment of the Ninth Circuit and to direct the issuance of a writ of habeas corpus.

CONCLUSION

The Court should grant this petition for certiorari and vacate or reverse the judgment of the Ninth Circuit.

Respectfully submitted:

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APPENDIX TABLE OF CONTENTS

Page

United States Court of Appeals for the Ninth Circuit, Plurality Opinion (Tashima, J.), dated June 21, 2010 ..... App. 1

United States Court of Appeals for the Ninth Circuit, Concurring Opinion (Silverman, J.), dated June 21, 2010..... App. 29

United States Court of Appeals for the Ninth Circuit, Dissenting Opinion (Kozinski, C.J.), dated June 21, 2010..... App. 31

United States Court of Appeals for the Ninth Circuit, Dissenting Opinion (Thomas, J.), dated June 21, 2010..... App. 68

United States District Court for the Central District of California, Report and Recommendation, dated March 7, 2005 ..... App. 69

United States District Court for the Central District of California, Order Adopting Report and Recommendation, dated April 7, 2005..... App. 96

Court of Appeal of the State of California, Opinion, dated March 26, 1998 ..... App. 98

Supreme Court of California, Order, dated July 8, 1998 ..... App. 135

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES FRANKLIN MURDOCH, JR., *Petitioner-Appellant*, v. ROY CASTRO, Warden; EDMUND BROWN, JR.,* Attorney General of the State of California, *Respondents-Appellees.*	No. 05-55665 D.C. No. CV 99-06900 RSWL OPINION

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted
March 24, 2009 – San Francisco, California

Filed June 21, 2010

Before: Alex Kozinski, Chief Judge, Andrew J. Kleinfeld,A. Wallace Tashima, Sidney R. Thomas, Barry G. Silverman, M. Margaret McKeown, Kim McLane Wardlaw, William A. Fletcher, Consuelo M. Callahan, Sandra S. Ikuta, and N. Randy Smith, Circuit Judges.

Opinion by Judge Tashima;
Concurrence by Judge Silverman;
Dissent by Chief Judge Kozinski;
Dissent by Judge Thomas

*Edmund Brown, Jr., is substituted for his predecessor, Bill Lockyer, as Attorney General of the State of California. Fed.R.App.P. 43(c)(2).

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OPINION

TASHIMA, Circuit Judge:

Charles Murdoch was convicted of murder in California state court. Before trial, the prosecutor informed the court that a prosecution witness and participant in the crime had written a letter to his attorney claiming that Murdoch was not involved in the crime and that the witness had been coerced into implicating Murdoch. The state court ruled that Murdoch could not have access to the letter because it was protected under California's attorney-client privilege. In order to determine whether Murdoch is entitled to habeas relief, we must decide whether, under "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), the Confrontation Clause of the Sixth Amendment of the United States Constitution[1] compelled the release of the letter to Murdoch in spite of the attorney-client privilege.

I. BACKGROUND[2]

On May 17, 1983, four men robbed the Horseshoe Bar in Long Beach, California. During the course of the robbery, one bystander was shot and

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[1] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. Amend. VI.

[2] The factual and procedural summary is taken largely from *Murdoch v. Castro*, 489 F.3d 1063, 1064-67 (9th Cir. 2007) ("*Murdoch II*").

killed; another was stabbed and severely wounded. The men recovered approximately $200 from the cash register and left behind a fingerprint. The crime went unsolved until 11 years later, when advances in fingerprint technology enabled police to identify Dino Dinardo as one of the perpetrators.

Officers arrested Dinardo on June 30, 1994, in Berkeley, California. When first questioned, Dinardo denied any involvement in the crime, but later recanted, admitting his involvement in the robbery, and identifying Murdoch as one of his accomplices. Both Dinardo and Murdoch were charged with murder accompanied by special circumstances.
Dinardo was tried first. At a suppression hearing that preceded his trial, Dinardo testified that his confession to the Long Beach police had been coerced, and that he had given the confession in exchange for a promise that he would be released to see his wife and daughter. Dinardo was convicted and was sentenced to 25 years' to life imprisonment. At sentencing, the judge said to Dinardo:

> I would like to do something different, Mr. Dinardo. You've probably been told it's a set sentence. I have to give it. The only thing I can say is I have 90 days to change the sentence if anything changes in the way of your mind or the District Attorney's mind insofar as trying to resolve this with something less than the set sentence.

> Frankly, from the standpoint of the other trial, unless the District Attorney has something more, I just wonder without your assistance where they're going; but maybe sometimes cases develop at the last minute. But, to my knowledge, I don't know of any other evidence. They have a very difficult case without your assistance.
>
> But that's actually between attorneys, and it's not the judge's province.
>
> I was hoping there would be a resolution so that I could sentence you to something less, which I would prefer to do from everything about this case, especially the length of time and all the years that you lived what appears to be a law-abiding life before you got arrested.

Dinardo subsequently did testify and, in return, received a reduction of his conviction to voluntary manslaughter and a reduced sentence of 12 years' imprisonment.[3] Dinardo was a key witness

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[3] The dissent states that "[f]or a judge to goad someone he's just given a life sentence into helping the prosecution by promising to give him his life back, but only if he helps finger the defendant, is judicial extortion." Diss. op. at 9046. What the Chief Judge harshly labels as "judicial extortion" has long been a part of our criminal justice system. *See, e.g.*, U.S.S.G. § 5K1.1 (providing for a downward sentencing departure for

at Murdoch's trial. He testified that, in 1983, Murdoch had approached him "to do a job" and that the two of them, together with two other men, robbed the Horseshoe Bar. According to Dinardo, when Murdoch entered the bar, Murdoch carried a

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substantial assistance in the prosecution of another person); 18 U.S.C. § 3553(f)(5) (providing that a "safety harbor" sentence below a statutory minimum is available only if, *inter alia*, the sentencing court finds that the defendant has fully cooperated with the Government). Perhaps the most famous example of such judicial "goading" or "extortion" is that of Chief Judge Sirica in the *Watergate* trial. There, as reported by *Time* magazine in its 1973 man-of-the-year story, Judge Sirica "kept the pressure on the other convicted conspirators to talk too by giving them harsh provisional sentences ranging up to 40 years. . . . He promised to review the sentences later and said that the final sentencing 'would depend on your full cooperation with the grand jury and the Senate Select Committee.' " *Available at* http://www.time.com/subscriber/personoftheyear/archive/stories/973.html (last visited May 15, 2010).

The dissent characterizes Judge Sirica's conduct of the *Watergate* trial as "unconscionable" and "a blemish on the reputation of the federal courts . . . ." Diss op. at 9046 n.*. The D.C. Circuit, sitting en banc, however, did not express the same, harsh view. It not only affirmed Judge Sirica's conduct, but lauded it in the face of charges that he conducted the trial and sentencing in an inquisitorial manner. *See United States v. McCord*, 509 F.2d 334, 347 (D.C. Cir. 1974) (en banc) ("The judge, like the prosecutor in this respect, is not a passive by-stander in the arena of justice, a spectator at a 'sporting event,' rather he or she has the most pressing affirmative responsibility to see that justice is done in every case." (footnotes omitted)), *cert. denied*, 421 U.S. 930 (1975); *see also United States v. Liddy*, 509 F.2d 428, 442 (D.C. Cir. 1974) ("Judge Sirica's palpable search for truth in such a trial was not only permissible, it was in the highest tradition of his office as a federal judge.").

.22 caliber rifle and announced loudly, "Don't nobody move. This is a stick-up." Dinardo took this as his cue to empty the cash register. He fumbled with the buttons on the register, heard a gunshot, emptied the register, and ran out the back door, joining the other two men in the getaway car, with Murdoch joining them about a minute later. He recalled seeing Murdoch in possession of the rifle both in the bar and in the car. Dinardo testified that the first time he learned that someone had been shot in the robbery was the day of his arrest, 11 years after the crime.

During Murdoch's trial, Murdoch's attorney, Dinardo's attorney, the prosecutor, and the presiding judge discussed a letter from Dinardo addressed to his then counsel. The letter was first brought to the court's attention by the prosecutor, who indicated that in her interviews of Dinardo, he told her of the existence of a letter in which he, Dinardo, stated that he was coerced by the police into implicating Murdoch in the crime. Dinardo's new counsel asserted the attorney-client privilege and work-product doctrine as grounds for refusing to disclose the letter. The court concluded that Dinardo's letter to Dinardo's former counsel, who was still representing Dinardo when the letter was written, was protected by the attorney-client privilege and thus could not be used, on cross-examination, to impeach Dinardo.

Although Dinardo was not cross-examined about the letter, Murdoch's counsel succeeded in

eliciting testimony that challenged Dinardo's credibility as a witness. Dinardo testified that he had been convicted of the same murder for which Murdoch was now being tried and that by testifying in Murdoch's trial, he would "get out in about five years" rather than 21 or more years. He admitted that when he was initially questioned by the police, he had lied and denied that he had ever been inside the Horseshoe Bar. He admitted that he would have done "whatever it took" to get out of custody and be reunited with his daughter. He also testified to convictions for grand theft in 1982 and petty theft in 1984. On re-direct examination by the prosecutor, Dinardo testified that during the police questioning, he named a "Charles or Chuck" as someone else involved in the crime, but he could not remember the last name. He was shown photographs at the end of the interview, and he identified Murdoch as one of his accomplices. On re-cross, he stated that he had testified in his own trial that his confession had been coerced. He also admitted that, had the fingerprints not identified him as one of the robbers, he would have continued to lie to the police about his involvement.

In addition to Dinardo, other witnesses from the Horeshoe Bar testified and provided in-court identification of Murdoch. The bartender, Dyanne Spence, described looking into Murdoch's eyes down the barrel of a rifle pointed at her face. "He's been scaring me for years," she said. She also testified that she had identified Murdoch at a live lineup at the county jail in 1994 and that she was sure

"beyond a shadow of a doubt" that Murdoch had committed the crime.

Murdoch was convicted of first-degree murder with a robbery-murder special circumstance, and sentenced to life imprisonment without parole. The California Court of Appeal affirmed the conviction, and denied Murdoch's petition for a writ of habeas corpus. The California Supreme Court denied Murdoch's petition for review.

Murdoch then filed a federal petition for a writ of habeas corpus, which the district court dismissed. On Murdoch's first appeal, we vacated the order denying Murdoch's habeas petition and remanded the case to the district court stating:

> Today, we address a situation where a substantial showing has been made that, depending upon the content of Dinardo's letter, the Confrontation Clause and attorney-client privilege are potentially at odds —a set of facts the Supreme Court has not yet examined. Its precedents, however, clearly provide that evidentiary privileges or other state laws must yield if necessary to ensure the level of cross-examination demanded by the Sixth Amendment.

Murdoch v. Castro, 365 F.3d 699, 702 (9th Cir. 2004) ("*Murdoch I*"). We concluded that if the contents of Dinardo's letter "are as generally described by the prosecutor and as Murdoch believes," then Murdoch "has arguably met his burden" of showing that the jury might have received a significantly different impression of the witness' credibility had Murdoch been able to pursue his proposed line of cross-examination. *Id.* at 705. General impeachment for bias implicated Dinardo's reliability to a lesser extent than actual statements inconsistent with his testimony, such as those which the letter purportedly contained. *Id.* Without knowing the contents of the letter, however, we could not make a determination of whether Murdoch's confrontation rights had been violated. We accordingly remanded the case to the district court with instructions that the court obtain the letter, inspect it in camera, and determine whether the state court's decision to deny Murdoch access to the letter violated Murdoch's Sixth Amendment right of confrontation. *Id.* at 706.

On remand, the magistrate judge, in his report and recommendation, began from the premise that "[e]ssentially, the Ninth Circuit held that the attorney-client privilege might have to yield in a particular case if the right of confrontation would be violated by enforcing the privilege." The report concluded that, although the state courts had read the contents of the letter, their decisions were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by

the Supreme Court of the United States," within the meaning of 28 U.S.C. § 2254(d)(1), in that they failed to perform any balancing of Murdoch's Sixth Amendment rights against the privilege.

Nevertheless, the report found that there was no constitutional violation because the letter's intrinsic probative value was low, given that, of the four factual assertions in the letter, "trial testimony rebutted the first three, and half of the fourth." The magistrate judge summarized the contents of the letter as asserting the following facts: (1) After Dinardo's arrest in Berkeley, Long Beach Police Detective Pavek coerced a statement from Dinardo by promising not to charge Dinardo in exchange for Dinardo's statement; (2) In his statement, Dinardo was forced to identify petitioner Murdoch as a participant in the crime; (3) Dinardo does not actually know Murdoch, although Dinardo is acquainted with Murdoch's brother; and (4) Murdoch and Dinardo did not commit any crime.

Because the factual assertions in the letter had been "contradicted by trial testimony" or "were demonstrably false in the light of other testimony," the magistrate judge found that the "intrinsic probative value of the letter was and is low." Thus, the exclusion of the letter from evidence did not substantially diminish Murdoch's right to effective cross-examination. The magistrate judge also concluded that the decision to exclude the letter was subject to harmless error analysis, and, further concluded, under the *Brecht v. Abrahamson*

standard, 507 U.S. 619, 637 (1993), that there was no "grave doubt" as to whether the jury would have reached a different result had the letter been admitted. While acknowledging that "Dinardo's testimony was crucial," the magistrate judge found that "Dinardo's prior inconsistent statement was inextricably linked with other statements which either conflicted with other evidence or were demonstrably false." Therefore, he concluded that any error resulting from the exclusion of the letter was harmless. The district court adopted the magistrate judge's findings and recommendation and denied Murdoch's habeas petition.

On Murdoch's second appeal, a divided three-judge panel affirmed the district court's denial of habeas relief in *Murdoch II*, 489 F.3d 1063. The majority pointed out that it was bound under the "law of the case" doctrine by the *Murdoch I* court's holding that, "under the right set of facts, Supreme Court precedent suggests the Sixth Amendment right to confrontation could support admission of the letter, even against a valid claim of attorney-client privilege." *Id.* at 1068. Although the *Murdoch I* court had not explicitly held that it was clearly established under Supreme Court law that the Confrontation Clause might support the introduction of the letter as evidence, the majority in *Murdoch II* interpreted this as a necessary implication of *Murdoch I* that was binding on the panel as the law of the case. *Id.* at 1068 & n.2. The panel then held that Murdoch was able to cross-examine Dinardo effectively in spite of not having access to the letter, and that

therefore the Sixth Amendment did not require that the letter be released to him. *Id.* at 1069-70.

Judge Bright[4] dissented from the panel's decision. He believed that access to the letter would have allowed Murdoch to impeach Dinardo's testimony much more effectively than was possible without the letter, and that, on the basis of *Murdoch I*, habeas relief should have been granted. *Id.* at 1070-72 (Bright, J., dissenting).

We granted Murdoch's petition for rehearing en banc.[5] *Murdoch v. Castro*, 546 F.3d 1051 (9th Cir. 2008).

II. JURISDICTION AND STANDARD OF REVIEW

We review de novo the district court's denial of a § 2254 habeas petition. *Tilcock v. Budge*, 538 F.3d 1138, 1143 (9th Cir. 2008). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a habeas petition challenging a state court conviction will not be granted unless the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §

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[4] The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation, was a member of the *Murdoch II* panel.

[5] The en banc court ordered supplemental briefing on the question of whether the court should reconsider its decision in *Murdoch I*.

2254(d)(1). Here, AEDPA applies because the state court denied Murdoch's claim "on the merits," rather than on a procedural or other ground. 28 U.S.C. § 2254(d)(1); *see Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004); *Reynoso v. Giurbino*, 462 F.3d 1099, 1109 (9th Cir. 2006) (assuming, unless it is otherwise "clear," that a state court has decided all the issues presented); *Hunter v. Aispuro*, 982 F.2d 344, 346-48 (9th Cir. 1992) (presuming denial of habeas relief is on the merits, not procedural grounds, unless the decision supports the opposite conclusion). Under § 2254(d), we cannot grant the writ unless the state court's decision (denying Murdoch's claim) is objectively unreasonable. *See Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000); *Pirtle v. Morgan*, 313 F.3d 1160, 1165, 1169 (9th Cir. 2002).

III. DISCUSSION

[1] The Confrontation Clause of the Sixth Amendment guarantees a defendant in a criminal case an opportunity for effective cross-examination of the witnesses against him. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). In *Murdoch I*, we implicitly held that it was clearly established by the Supreme Court that this right could, in some circumstances, be violated by the failure to produce a document that was otherwise protected by the attorney-client privilege. 365 F.3d at 705-06. The three-judge panel in *Murdoch II* was bound under the "law of the case" doctrine by *Murdoch I*'s holding. *See Murdoch II*, 489 F.3d at 1067-68. This

restriction, however, does not apply to the en banc court. *See Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 995 (9th Cir. 2003) (en banc). The question we must now confront, therefore, is whether *Murdoch I* was correct in holding that it is clearly established by Supreme Court precedent that the Sixth Amendment right to confrontation in some situations trumps the attorney-client privilege.

A

The Supreme Court has restricted "clearly established Federal law" under § 2254(d)(1) to " 'the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.' " *Carey v. Musladin*, 549 U.S. 70, 74 (2006) ("*Musladin II*") (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). A state court's decision is contrary to clearly established law when it either "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Williams*, 529 U.S. at 405-406. A state court unreasonably applies clearly established law when it "identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (quoting *Williams*, 529 U.S. at 413). To be an unreasonable application, the state court decision "must be objectively unreasonable," not just incorrect or erroneous. *Id.* at 75-76. Habeas

relief for an unreasonable application of law can be "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced. *Id.* at 76.[6] Habeas relief for an unreasonable application of law can be "based on an application of a governing legal principle to a set of facts different from those of

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[6] The California Court of Appeal, which rendered the last reasoned state court decision in this case, addressed Murdoch's Confrontation Clause argument only obliquely. It did not mention the Confrontation Clause in its opinion, but it did discuss and quote from the section of Murdoch's brief in which he raised the issue. The court also quoted from *People v. Godlewski*, 21 Cal. Rptr. 2d 796, 800 (Ct. App. 1993), a case that dealt with the tension between the attorney-client privilege and the Confrontation Clause. Whether the state court adequately responded to Murdoch's Confrontation Clause argument, however, is irrelevant. Even when there is no reasoned state court opinion explaining the denial of a defendant's claim in any respect, we "must assume that the state court has decided all the issues and 'perform an independent review of the record to ascertain whether the state court decision was objectively reasonable.' " *Reynoso*, 461 F.3d at 1109 (quoting *Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir. 2005) (per curiam)) (internal quotation marks omitted). Thus we do not review Murdoch's claim de novo, as we would if the state court had clearly indicated that it had not reached the merits of Murdoch's claim. *See id.*; *Pirtle*, 313 F.3d at 1167.

The dissent refuses to accept these established principles of AEDPA review. Instead, it spends several pages discussing the state appellate court's duty under state law to "analyze[ ] . . . [each] contention" and convinces itself that the state court erroneously "decline[d] to reach [the] issue" and "overlooked" it. *See* Diss. op. at 9050-52. But whether we review a claim de novo under the AEDPA is a question of federal law and, on that question, as explained above, we are bound by *Reynoso* and *Pirtle*.

the case in which the principle was announced." *Id.*; *accord Panetti v. Quarterman*, 127 S. Ct. 2842, 2858 (2007), but only when the principle "clearly extend[s]" to the new set of facts. *Wright v. Van Patten*, 128 S. Ct. 743, 745 (2008) (per curiam).

A review of the Supreme Court's recent case law on this subject suggests that, when a state court may draw a principled distinction between the case before it and Supreme Court caselaw, the law is not clearly established for the state-court case. In *Musladin II*, 549 U.S. at 77, the Supreme Court vacated a decision of this court, *Musladin v. Lamarque*, 427 F.3d 653, 661 (9th Cir. 2005) ("*Musladin I*"), in which this court held that the state court unreasonably applied clearly established federal law by allowing the victim's family members, in a murder trial, to wear buttons depicting the victim while in the presence of the jury.

In support of our decision in *Musladin I*, we relied primarily on two Supreme Court cases: *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986). In *Williams*, the Court noted that, when a defendant appears before the jury in prison garb, "[t]he defendant's clothing is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play." 425 U.S. at 505. Thus, a defendant's right to a fair trial is violated if he is required to appear in the presence of the jury in such attire. *Id.* at 505-06. The Court reaffirmed this basic position in *Flynn*, but held that

the presence of extra security personnel in the courtroom during trial did not necessarily violate the defendant's Sixth and Fourteenth Amendment rights because, unlike the situation described in *Williams*, it was not "inherently prejudicial." *Flynn*, 475 U.S. at 569. Although the presence of additional security in the courtroom might violate a defendant's right to a fair trial in a particular case, Flynn's trial, in which four uniformed state troopers sat silently in the first row of the spectator section, did not present such a case. *Id.* at 569-72. In *Musladin I*, we held that the presence of the victim's family in the courtroom while wearing buttons was inherently prejudicial, and was an unreasonable application of the test described in *Williams* and *Flynn*. *Musladin I*, 427 F.3d at 658-61.

When the Supreme Court vacated our grant of habeas relief in *Musladin I*, it pointed out that "[b]oth *Williams* and *Flynn* dealt with government-sponsored practices." *Musladin II*, 549 U.S. at 75. No Supreme Court case had applied *Williams* and *Flynn* to courtroom conduct by private actors, and, because part of the test established in *Williams* and *Flynn* asked "whether the [allegedly prejudicial] practices furthered an essential *state* interest," it was not clearly established that the test would apply to actions by private actors. *Id.* at 76. The Court summarized its reasoning as follows:

> Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators'

> courtroom conduct of the kind involved here, it cannot be said that the state court "unreasonabl[y] appli[ed] clearly established Federal law." § 2254(d)(1). No holding of this Court required the California Court of Appeal to apply the test of *Williams* and *Flynn* to the spectators' conduct here. Therefore, the state court's decision was not contrary to or an unreasonable application of clearly established federal law.

Id. at 77 (emendations in original).

Similarly, in *Van Patten*, the Court held that it was not clearly established that a defendant received ineffective assistance of counsel if his lawyer represented him via speakerphone, rather than by being physically present in the courtroom. 128 S. Ct. at 746-47. The Seventh Circuit had granted habeas relief on the basis of *United States v. Cronic*, 466 U.S. 648 (1984), which held that in certain circumstances a defendant need not prove that he was actually prejudiced by his attorney's conduct. The logic of *Cronic* is that, in some situations, "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 659-60. One situation in which *Cronic* applies is when "counsel [is] either totally absent, or prevented from assisting

the accused during a critical stage of the proceeding." *Id.* at 659 n.25. The Court reversed the Seventh Circuit because *Cronic* did not clearly apply to the facts at hand. *Van Patten*, 128 S. Ct. at 746. Although an attorney who participated in a hearing telephonically might not do as well as one who was physically present in the courtroom, the state court could reasonably believe that the attorney's performance would not be so poor as to justify relief without showing prejudice: "Our cases provide no categorical answer to this question." *Id.*

In *Panetti*, 127 S. Ct. 2842, by contrast, there was no principled way to apply the Court's precedent to a somewhat new factual situation and reach the state court's result; thus, the Court granted habeas relief. *Panetti* concerned the pending execution of person with a history of mental illness. 127 S. Ct. 2848-49. The Court identified the controlling legal principle as the holding of *Ford v. Wainwright*, 477 U.S. 399 (1986), which required that a prisoner who has made "a substantial threshold showing of insanity" be given a competency hearing before being subject to execution. *Id.* at 426 (Powell, J., concurring in part and concurring in the judgment).[7] The Court held that it was clearly established that *Ford* required a competency hearing with procedural protections for the prisoner, even though the standard in *Ford* was stated in general terms and

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[7] Because Justice Powell's opinion represented the narrowest ground on which five Justices agreed, the *Panetti* court recognized it as the controlling opinion. 127 S. Ct. at 2856.

the facts were not identical to those with which it was now faced. *Panetti*, 127 S. Ct. at 2858-59. There was no reasonable way to apply *Ford* that would not reach this result, and thus the state court had unreasonably applied the law when it failed to provide Panetti with a proper competency hearing. *Id.* at 2858.

[2] The common thread in all these cases is that when there is a principled reason for the state court to distinguish between the case before it and Supreme Court precedent, the state court's decision will not be an unreasonable application of clearly established Supreme Court law. As we stated in *Moses v. Payne*, 555 F.3d 742 (9th Cir. 2009):

> [W]hen a Supreme Court decision does not "squarely address[ ] the issue in th[e] case" or establish a legal principle that "clearly extend[s]" to a new context to the extent required by the Supreme Court in these recent decisions, it cannot be said, under AEDPA, there is "clearly established" Supreme Court precedent addressing the issue before us, and so we must defer to the state court's decision.

Id. at 754 (emendations in original) (quoting *Van Patten*, 128 S. Ct. at 746, 745).

[3] The Supreme Court has examined the potential conflicts between the Confrontation Clause

and other rights and privileges, including the marital privilege, *Crawford v. Washington*, 541 U.S. 36 (2004),[8] the Fifth Amendment privilege against self-incrimination, *Douglas v. Alabama*, 380 U.S. 415 (1965), and the state's interest in the confidentiality of adjudications of juvenile delinquency, *Davis v. Alaska*, 415 U.S. 308 (1974). But no Supreme Court case has directly addressed the potential conflict between state-law attorney-client privilege and the Confrontation Clause, as we acknowledged in *Murdoch I*, 365 F.3d at 702 ("Today, we address a situation where a substantial showing has been made that, depending upon the content of Dinardo's letter, the Confrontation Clause and attorney-client privilege are potentially at odds—*a set of facts the Supreme Court has not yet examined.*") (emphasis added). Indeed, in a case involving the attorney-client privilege, the Supreme Court has expressly stated that it would not consider the question whether the attorney-client privilege might yield in the face of constitutional rights. *Swidler & Berlin v. United States*, 524 U.S. 399, 408 n.3 (1998).

In *Swidler*, the Supreme Court addressed the scope of the attorney-client privilege -- specifically, "the extent to which the privilege survives the death of the client." *Id.* at 403. The Independent Counsel

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[8] *Crawford* was decided after Murdoch's conviction became final and does not apply retroactively on collateral review. *See Whorton v. Brockting*, 549 U.S. 406 (2007). Thus, whether the Supreme Court in *Crawford* explained "what the Sixth Amendment was supposed to prevent," Diss. op. at 9056, is irrelevant to our review under the AEDPA.

sought notes taken by an attorney during a meeting with his client, former Deputy White House Counsel Vincent Foster. Foster sought legal representation, but, shortly after the meeting, he committed suicide. *Id.* at 401-02. The Independent Counsel argued that "the attorney-client privilege should not prevent disclosure of confidential communications where the client has died and the information is relevant to a criminal proceeding." *Id.* at 403.

The Court began by discussing the purpose of the privilege, "to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.' " *Id.* (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). The Independent Counsel analogized the situation to the testamentary exception to the attorney-client privilege, arguing that "in criminal proceedings, the interest in determining whether a crime has been committed should trump client confidentiality." *Id.* at 406. The Court disagreed, stating that, unlike with the testamentary exception, "[t]here is no reason to suppose as a general matter that grand jury testimony about confidential communications furthers the client's intent." *Id.* As pertinent here, the Court further reasoned that "there is no case authority for the proposition that the privilege applies differently in criminal and civil cases." *Id.* at 408-09. Significantly, the Court noted that, "Petitioners, while opposing wholesale abrogation of the privilege in criminal cases, concede that

exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege," but the Court stated that "*[w]e do not . . . need to reach this issue*, since such exceptional circumstances clearly are not presented here." *Id.* at 408 n.3 (emphasis added).

[4] The Supreme Court accordingly has explicitly stated that it was not deciding whether the attorney-client privilege might have to yield to a criminal defendant's constitutional rights. We have held that a constitutional principle is not clearly established for purposes of § 2254 where the Supreme Court has expressly concluded that an issue is an "open question." *Earp v. Ornoski*, 431 F.3d 1158, 1185 (9th Cir. 2005); *see also Mejia v. Garcia*, 534 F.3d 1036, 1046 (9th Cir. 2008) (holding that the Supreme Court had not clearly established, for purposes of § 2254, that the admission of propensity evidence in that case was unconstitutional because the Supreme Court had expressed no opinion on the issue and the petitioner accordingly could "point to no Supreme Court precedent" establishing the constitutional right); *Larson v. Palmateer*, 515 F.3d 1057, 1066 (9th Cir. 2008) ("Because the Court has expressly left this issue an open question, the state court did not unreasonably apply clearly established federal law in determining that the admission of evidence of Larson's criminal history did not violate due process." (internal quotation marks omitted)).

The Eighth Circuit has relied on the Supreme Court's express reservation of the issue in *Swidler* to hold that the issue is not clearly established for purposes of § 2254. In *Newton v. Kemna*, 354 F.3d 776 (8th Cir. 2004), the state trial court denied the defendant's motion to produce the only eyewitness' medical records. The Eighth Circuit "note[d] that the Supreme Court has recognized in other circumstances that constitutional rights can trump evidentiary privileges," citing *Davis* and *Swidler*. *Id.* at 781. The court stated, however, that *Swidler* "expressly left open the question of whether a criminal defendant's constitutional rights might overcome the attorney-client privilege," and therefore concluded that the Supreme Court had not clearly established whether a state's "physician-patient privilege must give way to a defendant's desire to use psychiatric records in cross-examination." *Id.* at 781, 782; *see also Johnson v. Norris*, 537 F.3d 840, 846-47 (8th Cir. 2008) (discussing *Newton* and *Swidler* and concluding that, although *Davis* and *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), "establish that in at least some circumstances, an accused's constitutional rights are paramount to a State's interest in protecting confidential information," those cases "do not establish a specific legal rule that answers whether a State's psychotherapist-patient privilege must yield to an accused's desire to use confidential information in defense of a criminal case"). As the Eighth Circuit reasoned in *Newton*, "[g]iven the restrictive nature of habeas review, it is not our province to speculate as to whether the Supreme Court, if faced with the

issue, would find that [a state's] physician-patient privilege must give way to a defendant's desire to use [privileged material] in cross-examination." *Newton*, 354 F.3d at 782.

It is not mere formalism to distinguish between attorney-client privilege and other rights and privileges the Court has dealt with in its Confrontation Clause jurisprudence. The attorney-client privilege is, after all, "one of the oldest recognized privileges for confidential communications," *Swidler*, 524 U.S. at 403. The Supreme Court might well decide that it is worthy of greater protection than the marital privilege, *see Crawford v. Washington*, 541 U.S. 36, or the confidentiality of juvenile delinquency proceedings, *see Davis v. Alaska*, 415 U.S. 308. In addition, the Court might be more likely to protect documents subject to attorney-client privilege because it is easier to maintain such protection without eliminating the defendant's ability effectively to cross-examine a witness. Because the attorney-client privilege protects only a communication between an attorney and a client, not the facts that are communicated, a defendant would remain free to question the witness about the underlying facts, just as happened here. Despite not having access to the letter, Murdoch was able to cross-examine Dinardo on a wide range of subjects, including Dinardo's earlier denial of involvement in the murder. As the Supreme Court has explained, the attorney-client privilege does not "create a broad 'zone of silence' over" the subject matter of the communication. "The

privilege only protects disclosure of [the] communications [themselves]; it does not protect disclosure of the underlying facts," so long as the underlying facts can be proven without resort to the privileged materials. *Upjohn*, 449 U.S. at 395.

In *Crawford*, by contrast, the marital privilege prevented the defendant from cross-examining the witness at all. *See* 541 U.S. at 40. The same was true in *Douglas v. Alabama*, 380 U.S. at 416-17, when the witness asserted his Fifth Amendment privilege against self-incrimination.

[5] We acknowledge the possibility that the Supreme Court may in the future well decide that the Confrontation Clause in some cases requires the disclosure of documents that are subject to the attorney-client privilege. But under the highly deferential standard established by AEDPA and the Supreme Court, as long as the state court could have found a principled reason not to apply the Court's precedents to the current case, we may not grant habeas relief. As was the case in *Musladin II*, 549 U.S. at 77, "[n]o holding of th[e Supreme] Court required the California Court of Appeal to apply" cases such as *Douglas* and *Davis* to Murdoch. The relationship between the Confrontation Clause and the attorney-client privilege has not been clearly established by the Supreme Court; as a result, we cannot say that the California court unreasonably

applied clearly established Supreme Court law to Murdoch's case.[9]

IV. CONCLUSION

[6] Because the Supreme Court has not clearly established whether and in what circumstances the attorney-client privilege must give way in order to protect a defendant's Sixth Amendment confrontation rights, the California state court could not have unreasonably applied clearly established Supreme Court law when it denied Murdoch access to the letter. *See Musladin II*, 549 U.S. at 77. To the extent that it holds to the contrary, *Murdoch I* is overruled.

For the reasons set forth above, the judgment of the district court is **AFFIRMED**.

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[9] The concurrence faults Murdoch because his counsel "*only* sought disclosure of the letter Dinardo had written to his lawyer," and did not move to strike Dinardo's testimony. Concur. op. at 9044-45. It assumes that the *exclusive* procedure for preserving a Sixth Amendment confrontation claim is a motion to strike the challenged testimony, but cites no case so holding. Instead, the authorities on which Judge Silverman relies state only what is "ordinarily . . . appropriate," or that a defendant is "entitled" to have the testimony stricken, or what "many judges . . . agree." *Id.* at 9044-45. Because Judge Silverman agrees that Murdoch "unquestionably perfected his objection to the court's denial of the disclosure request," *id.* at 9045, we agree with Chief Judge Kozinski that, because "California is satisfied with the procedural posture of this case, [w]e are in no position to disagree." Diss. op. at 9067.

SILVERMAN, Circuit Judge, concurring:

This case is built on a false premise — that there was somehow a conflict between Dinardo's right to claim the attorney-client privilege under California law and Murdoch's federal constitutional right of confrontation. There was no conflict. The trial court could have sustained Dinardo's claim of privilege, and then having done so, stricken Dinardo's direct testimony on the ground that Murdoch could not be effectively cross-examined. This is a very common scenario when a witness testifies on direct but then cannot be cross-examined. *See Toolate v. Borg*, 828 F.2d 571, 572 (9th Cir. 1987) ("Ordinarily, when a testifying witness cannot or will not be cross-examined, the appropriate relief . . . is to strike the direct testimony of the witness and to instruct the jury to disregard it.") (internal quotation marks omitted); *United States v. Brown*, 634 F.2d 819, 824 (5th Cir. 1981) (stating that while "it is by no means clear that the appropriate resolution to a conflict between [the confrontation] right and the marital privilege is the actual introduction of the testimony" a defendant is entitled "to strike that portion of the testimony of the witnesses against him with regard to which his right of confrontation is lost"); 1 Kenneth S. Broun, et al., *McCormick on Evidence* § 19 (6th ed. 2006) (stating that "many judges and writers" agree that excluding the direct testimony is the proper remedy when a witness cannot be properly cross-examined).

The problem is that Murdoch's counsel *only* sought disclosure of the letter Dinardo had written to his lawyer, deputy public defender Star. When the trial court sustained the claim of attorney-client privilege, that's where Murdoch's lawyer was content to leave it. His lawyer unquestionably perfected his objection to the court's denial of the disclosure request, but never sought to strike Dinardo's testimony. This is the remedy that the law provides in the case of a witness who cannot be cross-examined for *any* reason. If the direct testimony cannot be tested by cross-examination, it cannot stand and is stricken.

Had the trial court denied a motion to strike Dinardo's testimony, we would have a legitimate confrontation problem on our hands, but no such motion was ever made. Thus, it cannot be said that the state court denied Murdoch's confrontation right at all, much less that it acted unreasonably or contrary to clearly established Supreme Court law. In the absence of a constitutional violation, federal habeas corpus relief cannot be granted. 28 U.S.C. § 2254(a), (d).

For these reasons, I would affirm the denial of habeas relief.

Chief Judge KOZINSKI, dissenting, with whom Judges W. Fletcher and Wardlaw join, and Judges Thomas and McKeown join with respect to Parts 2 and 3:

If it wasn't for bad luck, Murdoch wouldn't have no luck at all. He's wakin' up this mornin' in jail when there's strong proof he ain't done nothing wrong. I would certainly defer to a jury's contrary verdict if it had seen this evidence and convicted Murdoch after a fair trial, presided over by a fair judge, followed by an appeal where the justices considered all of his constitutional claims. But Murdoch had none of these.

Start with the trial judge: He was so worried that the prosecution couldn't put on sufficient evidence to convict Murdoch that he sentenced Murdoch's alleged confederate (Dinardo) to life in prison, but promised to give him a big break if he testified against Murdoch. True to his word, right after Dinardo fingered Murdoch, and as Murdoch's jury was retiring to deliberate, the judge rewarded Dinardo by reducing his life sentence to a walk-away twelve years—or, as Dinardo himself estimated, actual time served of about five years.

Put yourself in Dinardo's shoes: You've just been sentenced to spend the rest of your days behind bars, never again to hold your infant daughter in your arms. But the judge immediately dangles the promise of leaving prison and resuming a normal life before she turns eight, if only you help nail Murdoch.

Prosecutors are known to offer defendants a break if they testify truthfully against a co-defendant. For a judge to goad someone he's just given a life sentence into helping the prosecution by promising to give him his life back, but only if he helps finger the defendant, is judicial extortion.* You'd have to be more than human not to do or say whatever it takes to grab that brass ring.

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* I didn't coin the term; it comes from Philip Kurland, probably the preeminent constitutional scholar at the time of Watergate, who referred to Chief Judge Sirica's similar misconduct as "a form of extortion." Man of the Year: Judge John J. Sirica, *Time*, Jan. 7, 1974. James Fellers, then the ABA's President-Elect, likened Judge Sirica's treatment of the Watergate defendants to the "torture rack and the Spanish Inquisition." *Id.* Dean Monroe Freedman of Hofstra Law School argued that "Sirica deserves to be censured for becoming the prosecutor himself." *Id.*

Sirica's unconscionable conduct is a blemish on the reputation of the federal courts. While covering him with wet warm kisses as to his other questionable conduct, the D.C. Circuit stopped short of approving Sirica's blackjacking of the defendants. *United States* v. *McCord*, 509 F.2d 334, 346 n.35 (D.C. Cir. 1974) (en banc). No one, until today, has. Even the trial judge in Murdoch and Dinardo's cases recognized a judge shouldn't act this way. *See* p. 9063 *infra*. We've said as much in the past: "[J]udicial involvement in plea negotiations inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement," and that "violate[s] a defendant's fundamental constitutional rights." *United States* v. *Bruce*, 976 F.2d 552, 556 (9th Cir. 1992). "[C]ourts must not use the sentencing power as a carrot and stick . . . and they must not create an appearance of such a practice." *United States* v. *Stockwell*, 472 F.2d 1186, 1187 (9th Cir. 1973). One wonders whether these cases survive today.

Not only did the trial judge strong-arm Dinardo into testifying, he prevented the defense from seeing—and so from using for cross-examination—a letter Dinardo had written a year earlier exculpating Murdoch and disclosing that the police had coerced Dinardo into making false accusations. The letter, written by Dinardo's own hand on notebook paper, is still under seal, protected by Dinardo's vestigial attorney-client privilege, but Judge Bright's reconstruction is a fair summary:

> I would like to make a statement about the facts surrounding my arrest for robbery and murder. I was taking care of my young daughter when Long Beach police arrested me at my home in Berkeley. Two policemen, Detective Pavek and his partner, took me to the Berkeley Police Department and interviewed me. I wanted to get back to my daughter as I worried about her welfare. At that time, Detective Pavek coerced a statement from me and promised not to charge me if I made a statement that Charles Murdoch participated in the crime. But, I do not actually know Mr. Murdoch, although I know his brother. Mr. Murdoch and I did not commit any crime.

Murdoch v. *Castro*, 489 F.3d 1063, 1071 (9th Cir. 2007) (Bright, J., dissenting).

This letter would have destroyed Dinardo as a witness, so the trial judge suppressed it. After all, what's the point of putting the screws on Dinardo only to have his testimony decimated by his contrary prior statement? So the defense never got to see the letter and the jury never heard of it, despite cases from the state court of appeal and the state supreme court squarely holding Murdoch was entitled to the letter.

You'd think that, with all that controlling authority on point, the state appellate court would have reversed the conviction. But you'd be wrong. Judges can only reverse a conviction if they consider the defendant's winning argument. Here, the court of appeal, for reasons that can be explained only one way, *see* pp. 9050-52 *infra*, did not. It's not like the court summarily affirmed the conviction; it spent thirty pages going over Murdoch's other arguments and knocking them down like bowling pins. But Murdoch's best argument—the one for which the government had *no* answer—the state appellate judges just skipped over as if he never made it. This is passing strange, but it's what happened.

Now, to complete Murdoch's run of ill luck, a plurality of our panel grants deference to a non-existent state-court "adjudication" of his winning claim and concludes that the state courts were not unreasonable in holding what they in fact never held. And, even though a majority of the en banc panel agrees that Murdoch was denied his right to confrontation, our concurring colleague denies relief

based on a procedural default argument that the state has never made. If everybody went to heaven, I do believe poor Murdoch would miss the call.

1. AEDPA Deference. The plurality holds that the state courts adjudicated Murdoch's Confrontation Clause claim on the merits, so we must defer under AEDPA. Pl. op. 9032-33 & n.5. That's contrary to the facts, because the last reasoned decision of the state courts contains not a single word about the Confrontation Clause; it's contrary to the concerns of comity and federalism that motivated AEDPA, because the state courts have interpreted the Confrontation Clause as Murdoch suggests; and it's contrary to the very essence of habeas review, because no court will ever actually decide Murdoch's constitutional claim on the merits (unless lightning strikes and the Supreme Court intervenes).

a. Murdoch argued to the state courts that his Sixth Amendment right to confrontation was violated when Dinardo was allowed to testify, but could not be cross-examined about a letter he wrote exculpating Murdoch. Over the course of nearly twenty pages, Murdoch argued to the state court of appeal that "while the attorney-client privilege is entitled to great deference, the privilege must nonetheless yield when it clashes with more compelling Sixth Amendment rights of a criminal defendant to confrontation and cross-examination." Opening Brief at 125, *People* v. *Murdoch*, No. NA020621 (Cal. Ct. App. May 22, 1997). He also

argued that, if the privilege couldn't be forced to yield, "the constitutionally mandated solution to the dilemma *is to exclude the witness' testimony*." *Id.* at 137 (emphasis in original). In other words, Murdoch argued that either he should have been allowed to cross-examine Dinardo about the letter, or Dinardo's testimony should have been excluded. These arguments were backed up by plenty of citations to federal cases like *Douglas* v. *Alabama*, 380 U.S. 415 (1965), *and Davis* v. *Alaska*, 415 U.S. 308 (1974). And they were slam-dunks under California cases like *Vela* v. *Superior Court*, 208 Cal. App. 3d 141 (Ct. App. 1989), and *People* v. *Mincey*, 2 Cal.4th 408 (1992), both of which held that the Sixth Amendment right to confrontation supersedes the attorney-client privilege.

Murdoch took his appeal to the same court of appeal that decided *Vela*, and his case was assigned to the very same division of that court. He opened his Confrontation Clause argument by citing *Vela*, and he even had two of the *Vela* justices on his panel. Yet they did not discuss Murdoch's Confrontation Clause claim or distinguish *Vela* and *Mincey*. They simply ignored the issue, devoting not a single word to it over the course of a detailed thirty-page opinion that decided every one of Murdoch's other claims. The court of appeal's discussions of Murdoch's claims under the Fourth and Fourteenth Amendments consume almost seven pages. *People* v. *Murdoch*, No. NA20621, slip op. at 6-10, 19-20 (Cal. Ct. App. Mar. 26, 1998). Its analysis of Murdoch's Ex Post Facto Clause

argument takes up almost four pages. *Id.* at 23-26. The Sixth Amendment isn't even mentioned.

The court of appeal's failure to discuss the Confrontation Clause is all the more conspicuous because its opinion addressed Murdoch's other arguments about Dinardo's testimony and the letter; almost a third of the opinion—nine pages —is devoted to these topics. *Id.* at 14-19. Four and a half of those are specifically devoted to Murdoch's complaint that the letter was improperly withheld. *Id.* at 14-19. But these pages are filled with discussions of California evidence law, the nature of the attorney-client privilege under California law and various state-law objections. None of the cases the court of appeal cites apply the correct Sixth Amendment standard or do the relevant analysis. The Federal Constitution isn't mentioned, the Confrontation Clause isn't mentioned and there's definitely no discussion of *Douglas*, *Davis*, *Vela* or *Mincey*.

If you wonder how this could have happened, just read the state's response brief in the court of appeal. Like the court of appeal's opinion, it cites neither *Vela* nor *Mincey*. The state nowhere engages Murdoch's Sixth Amendment claim or so much as mentions his Confrontation Clause arguments about the letter. Response Brief at 33-36, *Murdoch*, Nos. B100877+.

None of this could possibly be Murdoch's fault; he couldn't have done more to put the court of appeal

on notice of his claim. Just look at the table of contents in his opening brief:

> XI. EVEN IF DINARDO'S LETTER WERE PRIVILEGED, APPELLANT'S 5TH AND 6TH AMENDMENT RIGHTS TO A FAIR TRIAL AND TO CONFRONT AND CROSS-EXAMINE THE CHIEF WITNESS AGAINST HIM WOULD TAKE PRECEDENCE OVER DINARDO'S ATTORNEY-CLIENT PRIVILEGE UNDER THE PARTICULAR FACTS OF THIS CASE

Id. at v. Murdoch's reply brief even tried to "respectfully redirect[ ] the Court's attention" to the sections of his opening brief that set out his Confrontation Clause arguments, ones
that the state's brief had overlooked. Reply Brief at 54-56 & n.17, *id.* Yet the court of appeal still decided his case without any discussion or acknowledgment of the Confrontation Clause.

We know they must have overlooked it, because California appellate courts can't intentionally skip over any claims: The California Constitution prohibits it. *See* 5 Cal. Jur. 3d *Appellate Review* § 706; *see also* Cal. Const. art. VI, § 14. To be sure, something as concise as "Defendant's remaining contentions do not merit discussion" will suffice. *See Lewis* v. *Superior Court*, 19 Cal.4th 1232, 1261-64 (1999); *People* v. *Rojas*, 118

Cal. App. 3d 278, 288-90 (Ct. App. 1981). But *something* must be said to indicate that the court is aware of the remaining issues and has resolved, rather than overlooked, them. The court of appeal in this case didn't include even a catch-all line and thus, according to state law, must be presumed to have overlooked the unaddressed issues.

It's not as though judges are immune from making this kind of mistake. *E.g.*, *United States* v. *California*, 558 F.2d 1347, 1353 (9th Cir. 1977) (noting on rehearing that "we overlooked" an argument made "in [the] briefs on appeal"), *rev'd*, 438 U.S. 645 (1978); *George Pepperdine Found.* v. *Pepperdine*, 126 Cal. App. 2d 154, 163-64 (Ct. App. 1954) (noting on rehearing that, "[b]y inadvertence," the court had "neglected" to distinguish between two separate demurrers); *see also* Fed. R. App. P. 40(a)(2); 5 Cal. Jur. 3d *Appellate Review* § 723 (2009). Truth be told, it happens to all of us once in a while.

An oversight usually doesn't make a difference because issues insignificant enough to escape notice are often meritless. *See, e.g.*, *California*, 558 F.2d at 1353; *Pepperdine*, 126 Cal. App. 2d at 164. But Murdoch had a winning argument based on binding California case law interpreting the federal Confrontation Clause—an argument the state effectively conceded by not responding to it. So, had the court of appeal actually thought about that claim, as it was required to, it would have had to

grant relief or disregard one of its own cases (*Vela*) while figuring out some way to distinguish on-point precedent from the California Supreme Court (*Mincey*). Courts just don't do that kind of work in white ink.

Not California Courts of Appeal at any rate. The requirement that they show they "necessarily and carefully analyzed the contentions" in play is no mere formality. *Rojas*, 118 Cal. App. 3d at 290. They can be reversed for disregarding it. *See Amwest Sur. Ins. Co.* v. *Wilson*, 11 Cal.4th 1243, 1266-68 (1995). The California Supreme Court has called this requirement an "[i]mportant incident[ ] of the right to appeal," one that's "been in existence as to [the California Supreme Court] since the adoption of the state Constitution of 1879 and as to the Courts of Appeal since their creation in 1904." *People* v. *Medina*, 6 Cal.3d 484, 489, 490 n.5 (1972) (internal citations omitted). For us to presume that an unmentioned claim was rejected on the merits does not respect state law. It disdains it.

When a California court fails to mention a claim, at least in catch-all fashion, we can be sure that it didn't decide the claim. And there is absolutely no authority for the proposition that a totally unmentioned, and therefore undecided, claim can be deemed to have been "adjudicated on the merits" when state law would treat the claim as overlooked. *See, e.g.*, 16A *Federal Procedure* § 41:179 (L. ed., West 2010) ("In making the determination of whether an issue was 'adjudicated on the merits' in

state court, the habeas court inquires into: (1) what state courts have done in similar cases . . . ."). The Supreme Court has held that when a state court declines to reach an issue because it erroneously concludes it need not, our review is *de novo*. *E.g.*, *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005); *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003). It makes no sense to treat an oversight born of negligence better than a mistake born of careful, if ultimately incorrect, reasoning.

b. This case exemplifies the problem with deferring to the sounds of silence. Had the court of appeal thought about Murdoch's claim, it would have realized that binding case law resolved the key issue in Murdoch's favor. Six years before Murdoch filed his appeal, the California Supreme Court held that a trial court erred in upholding an assertion of attorney-client privilege that conflicted with the Sixth Amendment. *Mincey*, 2 Cal.4th at 463-64. The facts of *Mincey* will sound familiar: A witness, implicated in the crime for which Mincey was convicted, testified pursuant to a cooperation agreement. The witness had communications with her attorney that, the defense believed, would cast doubt on her credibility at trial. The defense tried to question her about those statements, but she successfully asserted the attorney-client privilege. In those precise circumstances—where cross-examination as to attorney-client communications would have shed light on a witness's bias—the highest court in California held that the trial court

erred in sustaining the privilege. It did so based on the Confrontation Clause. *Id.* at 463-64.

Mincey is one in a string of California cases to hold that the attorney-client privilege, a creature of the law of evidence, must yield to a defendant's right to effective cross-examination, a command of the Constitution. The next most striking example is *Vela*. There the trial court sustained an attorney-client privilege claim by "the very police officers whose trial testimony will be necessary to prove the criminal charges filed against the defendants." 208 Cal. App. 3d at 150. The court of appeal—including two members of Murdoch's panel—unanimously reversed, based on the Confrontation Clause. *Id.* at 151.

So, the times when the California courts have actually adjudicated claims like Murdoch's, i.e., when there's evidence they thought about the issue as in *Vela* and *Mincey*, they've decided that the Sixth Amendment requires exactly what Murdoch claims it requires. To reach the opposite conclusion as the state judges did in *Vela*, *Mincey*, etc., all in the name of deference to those judges in *Murdoch*, does not show deference. Nor does it further "comity, finality, and federalism." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). It subverts them.

c. When a state court doesn't decide a federal claim but we defer nevertheless, a petitioner is stripped of his right to have some court, any court, determine whether he's "in custody in violation of

the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). This upsets the "delicate balance" struck by AEDPA between vindicating the rights of criminal defendants and upholding the authority of state courts as the primary forum for adjudicating these rights. *Williams*, 529 U.S. at 436.

AEDPA vests the state courts with primary responsibility for determining whether a prisoner's confinement violates the Constitution. *See id.* When states accept this responsibility—as evidenced by their adjudication of a petitioner's constitutional claims on the merits—AEDPA requires us to accord great deference. 28 U.S.C. § 2254(d). When states don't, AEDPA deference doesn't apply and we must review the claim *de novo*. *E.g.*, *Rompilla*, 545 U.S. at 390; *Wiggins*, 539 U.S. at 534.

This scheme preserves the essence of habeas review announced in *Moore* v. *Dempsey*, 261 U.S. 86, 91-92 (1923) (Holmes, J.), because it ensures that *some* court is open to review the constitutionality of a petitioner's custody. But if a federal court defers to a state that failed to decide a claim, *no* court a prisoner may turn to will *ever* determine if his custody actually violates the Constitution. By hypothesis the state courts didn't, and our review will be limited to determining whether there was an "unreasonable" constitutional error. *See Delgado* v. *Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000). That's probably why our colleagues in other circuits have refused to defer in these circumstances, *Lyell* v.

Renico, 470 F.3d 1177, 1182 (6th Cir. 2006) (Sutton, J.); *Canaan v. McBride*, 395 F.3d 376, 382 (7th Cir. 2005) (D. Wood, J.); *Norde* v. *Keane*, 294 F.3d 401, 410 (2d Cir. 2002) (Miner, J.); *Gruning* v. *DiPaolo*, 311 F.3d 69, 71 & n.5 (1st Cir. 2002) (Torruella, J.); *Neill* v. *Gibson*, 278 F.3d 1044, 1053 (10th Cir. 2001) (Tacha, C.J.), and even less egregious ones, *Shelton* v. *Purkett*, 563 F.3d 404, 408-09 (8th Cir. 2009) (Beam, J.); *Henderson* v. *Cockrell*, 333 F.3d 592, 600-01 (5th Cir. 2003) (Jolly, J.); *Fortini* v. *Murphy*, 257 F.3d 39, 47 (1st Cir. 2001) (Boudin, C.J.); *Hameen* v. *Delaware*, 212 F.3d 226, 248 (3d Cir. 2000) (Greenberg, J.); *see also Bell* v. *Cone*, 543 U.S. 447, 460-61 (2005) (per curiam) (Ginsburg, J., concurring); *Chadwick* v. *Janecka*, 312 F.3d 597, 605-06 (3d Cir. 2002) (Alito, J.).

2. **Merits.** I would therefore decide Murdoch's Sixth Amendment claim *de novo*. Murdoch had no opportunity to cross-examine effectively the key prosecution witness about the primary issue regarding his credibility: whether he wrote a letter admitting that his testimony against Murdoch was coerced and untrue. This was not some remote inconsistency regarding a minor detail irrelevant to guilt or innocence; this went to the heart of the prosecution's case. Murdoch's Sixth Amendment rights were clearly violated. But I would rule for Murdoch even on the plurality's own terms, because it would have been an objectively "unreasonable application of . . . clearly established federal law . . . as determined by the Supreme Court" for the

California courts to conclude otherwise. 28 U.S.C. § 2254(d)(1).

a. The plurality concludes that the supremacy of the Sixth Amendment over California's attorney-client privilege isn't "clearly established." Pl. op. at 9042. "There are few subjects," however, "upon which [the Supreme] Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965).

In *Crawford* v. *Washington*, 541 U.S. 36 (2004), the Supreme Court held up the trial of Sir Walter Raleigh as an example of what the Sixth Amendment was supposed to prevent. Read Raleigh's fate and consider what's "clearly established" about the Sixth Amendment:

> The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him . . . . Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may

> hope for favour." . . . [D]espite Raleigh's protestations that he was being tried "by the Spanish Inquisition," the jury convicted, and Raleigh was sentenced to death.
>
> One of Raleigh's trial judges later lamented that " 'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.' "

Crawford, 541 U.S. at 44 (citations omitted). This history is not part of the rule announced in *Crawford*. It long predates it. *See, e.g., California* v. *Green*, 399 U.S. 149, 157 n.10 (1970).

So, if the Sixth Amendment has been clearly established to mean anything, it's that the Cobhams and Dinardos of the world—defendants who implicate others as accomplices to curry favor with the sovereign—must either be subject to rigorous cross-examination or stand mute before the jury. There is a "basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Lee* v. *Illinois*, 476 U.S. 530, 541 (1986). There is also a "basic understanding" that forcing a witness to confront and explain his prior statements that contradict his testimony is the gold standard for effective cross-

examination. *See Harris* v. *New York*, 401 U.S. 222, 223-26 (1971). Nothing can deny a criminal defendant the right to have the government's key witness subject to this examination, certainly not "the vagaries of the rules of evidence." *Crawford*, 541 U.S. at 61. Not even a coordinate constitutional provision. *Harris*, 401 U.S. at 225-26.

b. The plurality stumbles into error because it never takes AEDPA's first step—identifying the fundamental legal principles announced in the Supreme Court's cases. Instead, the plurality treats the Supreme Court's Sixth Amendment jurisprudence like a series of unconnected contests between the right to confrontation and a particular rule of evidence: the Confrontation Clause v. the marital privilege; the Confrontation Clause v. the Fifth Amendment; the Confrontation Clause v. hearsay; etc. This way of looking at the Supreme Court's cases is myopic and wrong.

The Supreme Court uses cases with discrete facts to announce general principles. AEDPA instructs state courts to reasonably apply those principles, *see Williams* v. *Taylor*, 529 U.S. 362, 412 (2000), which the Court defines as the "*fundamental principles* established by [its] most relevant precedents." *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 258 (2007) (emphasis added). "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti* v. *Quarterman*, 551 U.S. 930, 953 (2007) (internal citations and quotation

marks omitted); *see also Lockyer* v. *Andrade*, 538 U.S. 63, 76 (2003). The plurality's insistence that habeas petitioners produce a " 'spotted calf' on the precise issue at hand" has no foundation in law. *Bradley* v. *Duncan*, 315 F.3d 1091, 1101 (9th Cir. 2002).

When there's no case on point, AEDPA permits relief if "a state court either unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply *or unreasonably refuses to extend that principle to a new context where it should apply*." *Williams*, 529 U.S. at 407 (emphasis added). All of the Court's Confrontation Clause jurisprudence points to one fundamental principle: Criminal defendants must be afforded the opportunity to effectively cross-examine the witnesses against them. *E.g.*, *Davis*, 415 U.S. at 316; *Pointer*, 380 U.S. at 405; *Douglas*, 380 U.S. at 418-20. That, and nothing else, is what needs to be "clearly established." *See Abdul-Kabir*, 550 U.S. at 258.

We can divine this "fundamental principle" solely from cases where a hearsay exception or court procedure prevented effective cross-examination, *e.g.*, *Lilly* v. *Virginia*, 527 U.S. 116 (1999); *Coy* v. *Iowa*, 487 U.S. 1012 (1988). *Williams* instructs us to reason analogically, and it would be unreasonable to refuse to extend the principle established in those cases to Murdoch's case. The right to cross-examination is "functional," and the harm to "reliability in . . . truth-finding," *Kentucky* v. *Stincer*,

482 U.S. 730, 737 (1987), caused by denying a defendant access to a prior inconsistent statement by the chief witness against him is far greater than the harm of allowing a witness to testify behind a screen. *Compare Coy*, 487 U.S. at 1020, *with Lee*, 476 U.S. at 541. *See also United States* v. *Mayans*, 17 F.3d 1174, 1184 (9th Cir. 1994); *Burr* v. *Sullivan*, 618 F.2d 583, 587 (9th Cir. 1980).

But we need not look afield. The Supreme Court has a specific category of Confrontation Clause cases that address "restrictions imposed by law or by the trial court on the scope of cross-examination." *Stincer*, 482 U.S. at 737 (internal quotation marks omitted). For example, the Court found a Confrontation Clause violation where "defense counsel was restricted by state confidentiality provisions from questioning a witness about his juvenile criminal record, although such evidence might have affected the witness' credibility." *Id.* at 738 (citing *Davis*, 415 U.S. at 318). Even where the law that restricts cross-examination is a coordinate constitutional provision like the Fifth Amendment, admitting the witnesses' testimony while upholding the privilege violates the Confrontation Clause. *Douglas*, 380 U.S. at 420. The plurality cites no cases —because none exist—where the Supreme Court upheld the admission of testimony after a witness invoked a privilege that prevented "impeach[ment] by use of his earlier conflicting statements." *Harris*, 401 U.S. at 226. No such cases exist because "it is axiomatic that the defendant may employ the witness's prior inconsistent statements in order to

impeach" the witness's testimony. *United States* v. *Adamson*, 291 F.3d 606, 612 (9th Cir. 2002).

The plurality's discussion of whether the attorney-client privilege is "worthy of greater protection" than a state's marital privilege, pl. op. at 9042, is utterly beside the point. Surely neither is of higher dignity than the Fifth Amendment privilege—the granddaddy of all evidentiary privileges—which nevertheless proved insufficient to overcome the Confrontation Clause in *Douglas*. 380 U.S. at 420. Even if the attorney-client privilege were of the same dignity as the Fifth Amendment, the need for "cross-examination and impeachment" would overcome it. *Harris*, 401 U.S. at 223-26. As in *Harris*, it's not an all-or-nothing proposition: Murdoch could have been allowed to cross-examine Dinardo based on the letter, but Dinardo could have been allowed to retain a species of use immunity, in that the letter could not then be used by the state against him in a criminal case. *See, e.g.*, *Bittaker* v. *Woodford*, 331 F.3d 715, 721-25 (9th Cir. 2003) (en banc); *see also People* v. *Hunter*, 2005 WL 1377738, at *10 (Cal. Ct. App. June 10, 2005) (Kline, J., concurring).

At any rate, this issue is much simpler than the plurality makes it out to be. Either an evidentiary privilege operates to deny an opportunity for effective cross-examination or it doesn't; if it does, the Sixth Amendment prohibits both giving effect to the privilege and admitting the witness's statements. The privilege may yield or the

witness may be excluded, but one or the other has to give. The bottom line is clearly established by a long line of Supreme Court cases: A witness may not testify against a defendant in a criminal trial if that witness cannot be cross-examined effectively.

Swidler & Berlin v. *United States*, 524 U.S. 399, 408 n.3 (1998), is nowhere to the contrary. The plurality relies on *Swidler*'s supposed "reservation" of a question about the attorney-client privilege as proof that the superiority of the Bill of Rights over California evidence law remains an open question. Obviously *Swidler* didn't make any such reservation. First, *Swidler* was a case about whether the attorney-client privilege survived the death of a client; it did not deal with a conflict between that privilege and anyone's constitutional rights. *Id.* at 401. Second, even the petitioner in *Swidler* conceded that the privilege could be breached when a criminal defendant's constitutional rights are implicated. *Id.* at 408 n.3. Third, the Supreme Court did not "reserve" a Sixth Amendment question for another day; the Court's opinion contains not a single word about the Confrontation Clause. The Court simply noted that it did not "need to reach" the far broader question of when the attorney-client privilege must yield in the face of a criminal defendant's constitutional rights at trial. *Id.*

But again, all this is beside the point. It doesn't matter if the attorney-client privilege turns out to be the Rock of Gibralter. If it is, the Supreme Court's cases teach that the testimony of the un-

cross-examined witness can't come in. We know this from *Douglas*, which dealt with just such an inviolable privilege—the Fifth Amendment. 380 U.S. at 420. Nothing in *Swidler* calls this remedy into question, because *Swidler* dealt only with whether the privilege can be *breached*. The prosecutors there weren't trying to admit the privileged communications at trial; they were trying to learn of their contents in furtherance of an investigation.

c. These "fundamental principles" of the right to confrontation have not escaped other federal courts of appeals. The Second Circuit has held that "where assertion of the [attorney-client] privilege unduly restricts a defendant's cross-examination, the witness' direct testimony may have to be stricken." *United States* v. *Coven*, 662 F.2d 162, 170-71 (2d Cir. 1981). The Seventh Circuit has affirmed that "the right of confrontation conferred by the Sixth Amendment" can trump "[e]ven privileges recognized when the Constitution was written," *viz.*, the attorney-client privilege. *United States* v. *Rainone*, 32 F.3d 1203, 1206 (7th Cir. 1994). And the Eleventh Circuit thinks the same, having held in *Jenkins* v. *Wainwright* that "limitations on questioning" based on the attorney-client privilege are permissible only to the extent that the court "permit[s] cross-examination sufficiently thorough to satisfy the sixth amendment." 763 F.2d 1390, 1392 (11th Cir. 1985); *see also Mills* v. *Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998). Until the plurality wreaked havoc with our law, we were a comfortable member of this group. *Murdoch* v. *Castro*, 365 F.3d 699, 702 (9th

Cir. 2004). Many state courts have also recognized that the attorney-client privilege may not prevent effective cross-examination. Most significant of these for our case is California, *see* pp. 9052-53 *supra*, but it is hardly alone, *see State* v. *Cascone*, 487 A.2d 186, 190-91 (Conn. 1985); *Neku* v. *United States*, 620 A.2d 259, 262-63 (D.C. 1993). The plurality ignores these voices by relying on a single footnote in an irrelevant Supreme Court case. If this is what the "clearly established law" test requires, then AEDPA did not limit habeas relief; it eliminated it.

d. The opportunity to cross-examine is particularly important when it can "expos[e] a witness' motivation in testifying." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678-79 (1986) (internal quotation marks omitted). It's all the more important when that witness is an accomplice cooperating with the government. *Lee*, 476 U.S. at 541; *see also Mayans*, 17 F.3d at 1184; *Burr*, 618 F.2d at 587. And *Van Arsdall* holds—it "clearly establishes"—that "cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony" violates a defendant's right to confront the witness. 475 U.S. at 679; *see also Adamson*, 291 F.3d at 612.

Here, the state's star witness wrote a letter that, according to the prosecutor at trial, said "in sum and substance . . . that Mr. Dinardo was coerced by the police into implicating defendant Murdoch in

this crime." [TR 249] "A reasonable jury might have received a significantly different impression of [Dinardo's] credibility" had they heard about it. *Van Arsdall*, 475 U.S. at 680. The trial judge denied Murdoch's jury the chance. That means Murdoch's Sixth Amendment right to confrontation was violated. *Id.*; *Davis*, 415 U.S. at 318. It would be unreasonable to conclude otherwise.

When there has been a Confrontation Clause error, we "cannot [consider] whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation: such an inquiry would obviously involve pure speculation." *Coy*, 487 U.S. at 1021-22. Harmlessness "must therefore be determined on the basis of the remaining evidence." *Id.* at 1022. Though the plurality purports not to reach this issue, there are rather large hints throughout the opinion that Murdoch's inability to cross-examine Dinardo was no big deal. Nothing could be farther from the truth.

Consider what the trial would have looked like sans Dinardo. Murdoch has always steadfastly maintained his innocence. No physical evidence has ever linked him to the crime. Four witnesses from the bar testified, but only three even vaguely recognized Murdoch. [TR 604] And they were highly equivocal. One patron said: "It's been 13 years. And I can't be positive." [TR 625] Another could only say that Murdoch looked "similar" to the gunman, because "it was so many years ago." [TR 550, 579] Though the plurality makes much of the bartender's

identification of Murdoch, pl. op. at 9029, she was shown Murdoch's picture in a photo array immediately after the robbery and didn't recognize him. [TR 161] More than a dozen years later, she points to the only defendant in the courtroom and is sure it's him. Weak tea. There was no way the prosecution could have gotten a conviction without a miracle called Dinardo.

But don't take my word for it; just see what the trial judge, who presided both over Murdoch's case and Dinardo's, has to say about it: "[U]nless the District Attorney has something more, I just wonder without [Dinardo's] assistance where they're going." Appendix at 9069. [SER 363] He notes that Murdoch's prosecutors "have a very difficult case without [Dinardo's] assistance." *Id.* [SER 363] That's why the judge wanted "to be able—that there would be some agreement that might be beneficial to Mr. Dinardo and the prosecution." *Id.* at 9068. [SER 362] Just in case this was too subtle to move Dinardo, the trial judge goes on to explain that he wants "to do something different," for Mr. Dinardo, rather than give him the "set sentence" the law required upon conviction for first degree murder. *Id.* at 9069. [SER 363] All of this was, as he acknowledged, "not the judge's province" and a matter "actually between attorneys." *Id.* [SER 363] But the trial judge also wanted Dinardo to know that "I have 90 days to change [your] sentence if anything changes in the way of your mind" about testifying against Murdoch. *Id.* [SER 363] Disgraceful.

Denying Murdoch the right to confront Dinardo cannot have been an error harmless beyond a reasonable doubt. If the state courts held otherwise—which they didn't—they unreasonably applied law clearly established by the Supreme Court.

e. The court of appeal did not decide Murdoch's constitutional claim, so it's unclear whether the harmless-error standard of *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993), applies in place of the *Chapman* standard. *See Fry* v. *Pliler*, 551 U.S. 112, 118-19 (2007). But it makes no difference. Just as it would be objectively unreasonable to conclude that the error in this case was harmless beyond a reasonable doubt, *see* pp. 9062-63 *supra*, it's obvious this error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 631.

The plurality suggests that Murdoch "succeeded in eliciting testimony that challenged Dinardo's credibility as a witness," so any error couldn't have affected the jury's verdict. Pl. op. at 5. Even if that kind of argument could be made here, *but see Coy*, 487 U.S. at 1022, there's a huge difference between routine impeachment for bias and *specific* evidence that a witness has admitted that his trial testimony is untrue and a product of coercion from the get-go. The Supreme Court has long recognized the extraordinary effect that a witness's own inconsistent statement can have on a

jury. In a case addressing confessions, the Court held that a defendant's own inconsistent statements are "probably the most probative and damaging evidence that can be admitted against him." *Arizona* v. *Fulminante*, 499 U.S. 279, 296 (1991) (internal quotation marks omitted). The same, of course, would have been true for Dinardo. The letter was nothing less than a confession that Dinardo had lied about the central matter of his testimony. No only that, but the letter would have explained *why* Dinardo was lying. It shows it wasn't just the trial judge's generous deal. The police had pressured him from the outset.

Plea bargains are cut every day and jurors know it. A letter like Dinardo's comes along once in a lifetime. As Judge Bright put it in his powerful dissent, "[t]he letter and its disavowal of Murdoch's involvement in the crime would have been the piece de résistance, leading inextricably to the conclusion that Dinardo was not only generally unreliable but also untrustworthy regarding the one element of his testimony that the jury (as its verdict demonstrates) must have believed." *Murdoch*, 489 F.3d at 1071. "The concluding question on cross-examination of Dinardo seems obvious: 'Were you lying then or are you lying now?' " *Id.* Forcing a witness to admit to the jury that he's a liar is the Holy Grail of cross-examination. What Murdoch got instead was a paper cup.

Surely there must be grave doubt whether the jury would have reached a different result if the

letter had been admitted. Murdoch is entitled to a new trial so that cross-examination—the "greatest legal engine ever invented for the discovery of truth," *Green*, 399 U.S. at 158 (internal quotation marks omitted)—can be allowed to do its work.

3. **Procedural Default.** Judge Silverman agrees that Murdoch was denied his right to confrontation, but refuses relief because Murdoch's trial counsel "never sought to strike Dinardo's testimony." Concurrence at 9045. Judge Silverman doesn't contest that Murdoch argued on appeal that Dinardo's testimony should have been stricken. His problem with the timing of Murdoch's request must therefore sound in procedural default rather than exhaustion. In other words, Judge Silverman seems to think that, because Murdoch didn't move to exclude Dinardo's testimony at trial, his objection came too late—perhaps for failure to obey a contemporaneous objection rule or the like. State and federal law of procedural default belie such a claim.

As far as *Vela* reveals, Murdoch requested at trial precisely the remedy provided for under California law. Striking a witness's direct testimony isn't the *only* way California could have observed the Sixth Amendment's essential command. *Vela* holds as a matter of state law that, if necessary to permit effective cross-examination, California's attorney-client privilege "must give way." 208 Cal. App. 3d at 150. That's exactly what Murdoch asked for at trial.

I also doubt whether the California courts would have held Murdoch to any default, if default there was. California law says that "[a] defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." *People* v. *Vera*, 15 Cal.4th 269, 276-77 (1997); *see also People* v. *French*, 43 Cal.4th 36, 46-47 (2008). And even if the California courts would ordinarily have held that Murdoch's claim was procedurally defaulted, the trial judge's conduct in this case might have excused any default. *See People* v. *Hill*, 17 Cal.4th 800, 820-22 (1998). These uncertainties would make me think long and hard whether, if California would hold that Murdoch somehow procedurally defaulted his claim, that's an "independent and adequate" procedural bar to federal relief. *Cf. Townsend* v. *Knowles*, 562 F.3d 1200, 1207-08 (9th Cir. 2009). I would also have to consider whether Murdoch can excuse any default by showing cause and prejudice, particularly in light of the trial judge's conduct. *Cf. Cook* v. *Schriro*, 538 F.3d 1000, 1025-26 (9th Cir. 2008).

But I need not reach any of these difficult issues because procedural default is " 'an affirmative defense, and *the state has the burden* of showing that the default constitutes an adequate and independent ground' " for denying relief. *Scott* v. *Schriro*, 567 F.3d 573, 580 (9th Cir. 2009) (quoting *Insyxiengmay* v. *Morgan*, 403 F.3d 657, 665 (9th Cir. 2005)) (emphasis in original). California didn't argue to the district court, and it hasn't argued to us, that the state courts rejected Murdoch's Confrontation

Clause claim on a procedural ground (or even that they should have). Nor has the state argued, as Judge Silverman would hold, that Murdoch was required to request exclusion of the witness at trial and that his failure to do so bars him from obtaining federal relief. That's the end of the road for any theory that Murdoch should be denied relief because he didn't ask for a particular remedy from the state trial court. *Chaker* v. *Crogan*, 428 F.3d 1215, 1220-21 (9th Cir. 2005). Habeas courts do not scour the record in search of every conceivable defect in a petitioner's presentation of a claim to the state courts. *Vela* is but one example of why: What we might require to preserve a claim is not always what the state courts would require. *Compare* Concurrence at 9044-45 *with Vela*, 208 Cal. App. 3d at 151.

California is satisfied with the procedural posture of this case. We are in no position to disagree.

* * *

Today we become the only court in the country to hold that a state court may adjudicate a constitutional claim "on the merits" by overlooking it, and then have its carelessness rewarded with AEDPA's presumption that its adjudication was good enough for government work. We defer to a decision the state courts never made to reach a result that the state's highest court disagrees with. We fail to give effect to the plain meaning of the Confrontation

Clause—one of the best-established principles of Anglo-American law—on the ground that it isn't "clearly established." Any one of these errors would be remarkable, but their combination produces a truly spectacular miscarriage of justice.

The purpose of AEDPA is to allow state courts to operate in good faith. So, in the ordinary case, when a defendant has an unbiased judge and the state courts take his constitutional claims seriously, we must defer even if we disagree on the merits. But this isn't an ordinary case. The state trial judge coerced a key witness into testifying and the state appellate judges never addressed the key claim on appeal. Cases like this are the reason federal habeas exists. When a federal constitutional claim falls through the cracks of a state's criminal justice system, federal courts must be there to catch it. No one else can. Charles Murdoch certainly deserved better from the California courts. Ultimately, though, it is we who surely did let him fall.

LONG BEACH, CALIFORNIA; WEDNESDAY,
SEPTEMBER 20, 1995
P.M. SESSION
DEPARTMENT SOUTH K HON. CHARLES D.
SHELDON, JUDGE
(APPEARANCES AS HERETOFORE NOTED.)

(THE FOLLOWING PROCEEDINGS WERE HELD
IN OPEN COURT:)

THE COURT: MR. DINARDO IS BEFORE THE COURT. THE LAWYER IS HERE, TOO, MR. FULLER. MR. CARBAUGH IS HERE FOR THE PEOPLE.

WE HAVE CONTINUED THIS A NUMBER OF TIMES.

MR. FULLER: JUST ONE MOMENT, YOUR HONOR.

THE COURT: GO AHEAD.

(THE DEFENSE COUNSEL SPEAKS WITH HIS CLIENT SOTTO VOICE.)

MR. FULLER: WE ARE READY TO PROCEED.

THE COURT: THIS COURT WOULD LIKE TO BE ABLE - - THAT THERE WOULD BE SOME AGREEMENT THAT MIGHT BE BENEFICIAL TO MR. DINARDO AND THE PROSECUTION, BUT WHAT I'VE HEARD INFORMALLY IS APPARENTLY WE'RE GOING FORTH WITH THE SENTENCING.

IS THAT TRUE, MR. FULLER?

MR. FULLER: YES, YOUR HONOR, THAT IS.

THE COURT: OKAY.

MR. CARBAUGH: AND I CAN SAY THE PEOPLE ARE READY FOR SENTENCING. I CAN ALSO SAY THAT MR. FULLER AND I HAVE HAD MANY DISCUSSIONS THAT I KNOW HE'S COMMUNICATED TO MR. DINARDO, AND MR. DINARDO HAS CHOSE TO PROCEED THE WAY

PUTTING ME TO TRIAL. AND I BELIEVE IN LAW AND ORDER. AND THAT'S ABOUT IT.

THE COURT: WELL, AS I HAVE ALREADY INDICATED BY AN INDIRECT RESPONSE TO MR. FULLER, I WOULD LIKE TO DO SOMETHING DIFFERENT, MR. DINARDO. YOU'VE PROBABLY BEEN TOLD IT'S A SET SENTENCE. I HAVE TO GIVE IT. THE ONLY THING I CAN SAY IS I HAVE 90 DAYS TO CHANGE THE SENTENCE IF ANYTHING CHANGES IN THE WAY OF YOUR MIND OR THE DISTRICT ATTORNEY'S MIND INSOFAR AS TRYING TO RESOLVE THIS WITH LESS THAN THE SET SENTENCE.

FRANKLY, FROM THE STANDPOINT OF THE OTHER TRIAL, UNLESS THE DISTRICT ATTORNEY HAS SOMETHING MORE, I JUST WONDER WITHOUT YOUR ASSISTANCE WHERE THEY'RE GOING; BUT MAYBE SOMETIMES CASES DEVELOP AT THE LAST

MINUTE. BUT, TO MY KNOWLEDGE, I DON'T KNOW OF ANY OTHER EVIDENCE. THEY HAVE A VERY DIFFICULT CASE WITHOUT YOUR ASSISTANCE. BUT THAT'S ACTUALLY BETWEEN ATTORNEYS, AND IT'S NOT THE JUDGE'S PROVINCE.

I WAS HOPING THERE WOULD BE A RESOLUTION SO THAT I COULD SENTENCE YOU TO SOMETHING LESS, WHICH I WOULD PREFER TO DO FROM EVERYTHING ABOUT THIS CASE, ESPECIALLY THE LENGTH OF TIME AND ALL THE YEARS THAT YOU LIVED WHAT APPEARS TO BE A LAW-ABIDING LIFE BEFORE YOU GOT ARRESTED.

UNFORTUNATELY FOR YOU, TECHNOLOGY HAS ADVANCED TO THE POINT WHERE YOU GOT ARRESTED WAY LATE IN THE GAME.

THE COURT MUST IMPOSE 25 YEARS TO LIFE FOR THE CONVICTION OF THE JURY. THAT'S WHAT IMPOSE. I WILL STAY THE 12022 ALLEGATION. I THINK IT'S ON YEAR. THAT STAY

WILL BECOME PERMANENT WHEN YOU SERVE THE TERM THAT YOU ARE GOING TO HAVE TO SERVE UNLESS SOMETHING CHANGES IN THE NEXT 90 DAYS.

$200 RESTITUTION FINE. 13967 GOVERNMENT CODE.

WHEN YOU ARE RELEASED ON PAROLE, ANY VIOLATION OF TERMS AND CONDITIONS OF PAROLE OR ANY LAW, YOU COULD GO BACK TO PRISON FOR ADDITIONAL TIME DURING THE TIME YOU ARE ON PAROLE.

ADDITIONALLY, IF YOU WANT TO APPEAL THE CONVICTION, THE SENTENCE OR BOTH, DON'T HAVE THE MONEY TO DO SO, AN ATTORNEY WILL BE APPOINTED FOR YOU TO FILE THE APPEAL BETWEEN NOW AND 60 DAYS FROM NOW. AND APPLY FOR AN ATTORNEY, IF YOU WANT ONE, TO THE DISTRICT COURT OF APPEALS.

MR. FULLER: YOUR HONOR, SO THE RECORD IS COMPLETE, I AM AT THIS TIME

FILING A NOTICE OF APPEAL WITH THIS COURT.

THE COURT: THANK YOU.

WE NEED A LOT OF CREDITS. HAVE YOU FIGURED THEM?

MR. FULLER: NO, YOUR HONOR, BUT I CAN FIGURE THEM IN 30 SECONDS.

THE COURT: TELL THE CLERK WHEN YOU DO THEM, AND SEE IF MR. CARBAUGH AGREES; AND THOSE WILL BE THE CREDITS.

MR. CARBAUGH: THANK YOU, YOUR HONOR.

(PROCEEDINGS CONCLUDED.)

THOMAS, Circuit Judge, with whom MCKEOWN, Circuit Judge, joins, dissenting:

As Judge Tashima has pointed out, the California Court of Appeal referenced Murdoch's Confrontation Clause argument in its decision and discussed the attorney-client privilege in quoting *People v. Godlewski*, 21 Cal. Rptr.2d 796, 800 (Ct. App. 1993). Assuming, *arguendo*, that the last reasoned state court opinion decided the Confrontation Clause argument on the merits, and that our review is therefore not *de novo*, I would still conclude that Murdoch is entitled to federal habeas relief.

For the reasons articulated by Chief Judge Kozinski, the California Court of Appeal decision was an objectively unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States in a long series of cases, including *Crawford v. Washington*, 541 U.S. 36 (2004), *Davis v. Alaska*, 415 U.S. 308 (1974), and *Douglas v. Alabama*, 380 U.S. 415 (1965). Thus, I join parts 2(a)-(e) and part 3 of Chief Judge Kozinski's dissent.

[FILED MARCH 7, 2005]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

CHARLES MURDOCH, Petitioner, v. ROY CASTRO, Warden, et al., Respondents.	Civil No. CV-99-06900-RSWL (Mc) THIRD REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This Third Report and Recommendation is submitted to the Honorable Ronald S.W. Lew, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 (b) (1) (B) and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, the magistrate judge recommends that the court deny the present petition on the merits with prejudice.

BACKGROUND

The petitioner is a state prisoner at the High Desert State Prison in Susanville, California.

On December 28, 1995, after a trial in the Los Angeles County Superior Court, a jury found the

petitioner guilty of one count of first degree murder and one count of attempted murder. [Motion to Dismiss, Exh. A.] The jury also found that the petitioner committed the murder while he was engaged in the commission of the crimes of robbery and burglary and that a principal in the murder was armed with a firearm. [Motion to Dismiss, Exh. A.] On February 22, 1996, the trial court sentenced the petitioner to the state prison for a term of life without the possibility of parole plus one year. [Motion to Dismiss, Exh. B.]

The petitioner appealed the trial court judgment to the California Court of Appeal. [Motion to Dismiss, Exh. C] The petitioner also concurrently filed a petition for writ of habeas corpus in the California Court of Appeal. [Motion to Dismiss, Exh. G.] On March 26, 1998, the California Court of Appeal denied the petition for writ of habeas corpus. [Motion to Dismiss, Exh. D, p. 218.] As to the appeal, the California Court of Appeal modified the trial court judgment to strike the conviction for attempted murder but affirmed the trial court judgment in all other respects. [Motion to Dismiss, Exh. D., p. 242.]

On May 1, 1998, the petitioner filed a petition for review in the California Supreme Court. [Motion to Dismiss, Exh. E.] On July 8, 1998, the California Supreme Court denied the petition for review. [Motion to Dismiss, Exh. F.]

On July 6, 1999, the petitioner filed his initial petition for writ of habeas corpus in this court. On September 20, 1999, the respondent filed a motion to

dismiss for failure to exhaust state remedies. On October 22, 1999, the petitioner filed a motion to amend the petition and a first amended petition containing seven claims. On November 2, 1999, the court granted the petitioner's motion to amend.

The first amended petition contained seven claims, among which were claims 4 and 5 which alleged:

Claim 4

The petitioner was deprived of his constitutional right to cross-examination when the trial court allowed an improper assertion by prosecution witness Dinardo of the attorney-client privilege.

Claim 5

The petitioner's Fifth and Sixth Amendment rights were violated when the trial court allowed prosecution witness Dinardo to testify after Dinardo made two statements, one incriminating the petitioner and the other exonerating the petitioner, and allowed Dinardo to invoke the attorney-client privilege so as to exclude the exculpatory statement.

One September 14, 2001, the magistrate judge caused to be filed a Report and Recommendation, recommending that the district judge deny the petition on the merits.

On November 18, 2001, the magistrate judge caused to be filed a Final Report and Recommendation, responding to objections filed by the petitioner and again recommending that the district judge deny the petition on the merits.

On March 8, 2002, the district judge caused to be entered a judgment denying the petition on the merits.

The petitioner appealed.

On April 5, 2004, the Ninth Circuit Court of Appeals in a published opinion vacated the judgment and remanded the action to the district court for further proceedings. Murdoch v. Castro, 365 F.3d 699 (9th Cir. 2004).

STATEMENT OF FACTS

The following facts are taken from the reported decision of the Ninth Circuit Court of Appeals:

Petitioner Charles Murdoch is currently serving a life sentence without possibility of parole in the California penal system for convictions of first degree murder and attempted murder. The convictions are based upon a murder which occurred in 1983 while four people were committing a robbery in the Horseshoe Bar in Long Beach California. One bystander was shot and killed; another was stabbed and wounded. After an initially fruitless investigation, the case was designated an unsolved crime. The investigation remained dormant until 1994, when the Long Beach Police Department had acquired the necessary technology to access a previously inaccessible central fingerprint database and ran the prints on file in this case. That led to the identification of Dino Dinardo as one of the robbers. The Horseshoe's bartender, Dyanne Spence, then tentatively identified Dinardo, and he was arrested in June 1994.

When first questioned by a police detective, Dinardo denied any involvement in the incident. Under pressure from the police, however, he then recanted, admitted to his involvement in the robbery, and identified Charles Murdoch, the petitioner, as one of his accomplices. The District Attorney eventually charged both Dinardo and Murdoch with murder accompanied by special circumstances, crimes carrying possible sentences of life imprisonment without parole.

Dinardo was tried by himself and convicted by a jury of first-degree murder and sentenced to twenty-five years to life. At Dinardo's sentencing, however, the sentencing judge suggested that his sentence might be subsequently reduced if he cooperated and testified against Murdoch. Dinardo took the hint and agreed to testify against Murdoch in return for a reduction of his conviction to voluntary manslaughter with a sentence of twelve years.

At Murdoch's trial, Dinardo testified that on the day of the robbery, Murdoch came by his house with an unidentified Mexican-American man Dinardo did not know and asked if Dinardo wanted to make some money by doing "a job," which he understood to mean committing a hold-up. Dinardo was to grab the money out of the till while the others, who would be armed with a gun and a knife, kept watch. Another unidentified Mexican-American man was driving the car they rode in to the bar. Murdoch entered the bar armed with a .22 caliber rifle and announced the robbery. Dinardo jumped across the bar and took two hundred dollars out of the register,

at which time he heard a shot. He left through the back door and they all divided the money. Dinardo testified that he did not know anyone was hurt until he was questioned by the investigators in 1994.

In addition to Dinardo, witnesses from the bar also testified, including bartender Spence. After Murdoch's arrest in 1994, Spence identified him in a line-up, but she and others had been unable positively to identify Murdoch in photo arrays eleven years earlier, on the heels of the robbery. The record strongly suggests that without Dinardo's accomplice testimony, the prosecution's case against Murdoch was weak.

Murdoch used Dinardo's reduced sentence and lesser conviction to impeach him, but here's the rub. Prior to opening statements, the prosecutor informed the trial court and defense counsel she had discovered the existence of a letter, apparently written by Dinardo to his attorney, in which Dinardo allegedly exonerated Murdoch and claimed that his own statements to the contrary had been coerced by the police. The prosecutor claimed never to have possessed or actually seen the letter. She knew of its existence only through an interview with Dinardo. The letter, it turned out, was in the possession of Dinardo's attorney, who asserted on Dinardo's behalf that it was protected by the attorney-client privilege. The trial court took possession of the letter without allowing Murdoch's counsel or the prosecutor to see it and ruled after reading it that Dinardo was entitled to the privilege. The court did so without mention of the constitutional guarantee now at

issue. After so ruling, the court returned the letter to Dinardo's attorney and ordered that he safekeep it in case of appeal.

One direct appeal, and in his petitions for state post conviction and federal habeas relief, Murdoch raised, *inter alia*, his claim that the trial court's failure to allow him to see or use the privileged letter violated his right to confrontation. The California Court of Appeal denied relief, and the California Supreme Court declined his petition for review. Petitioner's federal habeas petition was denied by the district court. This circuit granted a Certificate of Appealability limited to the issue of "whether appellant's federal constitutional rights were violated when the trial court ruled that prosecution witness Dinardo's letter was protected by attorney-client privilege." Murdoch v. Castro, 365 F.3d at 700-702.

DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

The Ninth Circuit construed the petitioner's claim as one under the Confrontation Clause of the Sixth Amendment. The petitioner asserted that he had been deprived of the right to effective cross-examination of Dino Dinardo when the trial court sustained Dinardo's claim of attorney-client privilege and prevented disclosure of a letter which Dinardo wrote to his lawyer while in jail awaiting trial. The Ninth Circuit held that this factual situation presented:

"a situation where a substantial showing has been made that, depending upon the content of

Dinardo's letter, the Confrontation Clause and attorney-client privilege are potentially at odds -- a set of facts the Supreme Court has not yet examined. Its precedents, however, clearly provide that evidentiary privileges or other state laws must yield if necessary to ensure the level of cross-examination demanded by the Sixth Amendment."

Murdoch v. Castro, 365 F.3d at 702, citing Olden v. Kentucky, 488 U.S. 227, 232, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988), Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); Davis v. Alaska, 415 U.S. 308, 319, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); and Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

Essentially, the Ninth Circuit held that the attorney-client privilege might have to yield in a particular case if the right of confrontation would be violated by enforcing the privilege. Murdoch v. Castro, 365 F.3d at 703, citing United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994). "The court must ultimately decide whether the probative value of the [excluded] alleged privileged communication was such that the defendant's right to effective cross examination was substantially diminished." Murdoch v. Castro, 365 F.3d at 703, quoting United States ex rel. Blackwell v. Franzen, 688 F.2d 496, 501 (7th Cir. 1982).

The Ninth Circuit decision concluded:

Without knowing the contents of the letter, or seeing any evidence that the contents were examined by the state courts during Mudoch's post-conviction relief proceedings, the federal courts are

not able to determine whether or not the California Court of Appeal's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d). Similarly, without the letter, we are unable to determine in the first instance whether, in this case, the attorney-client privilege "must fall before the right of petitioner to seek out the truth in the process of defending himself." *Davis*, 415 U.S. at 320, 94 S.Ct. 1105. We will not "require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness," where neither the state nor federal courts actually reviewed the privileged material on habeas and made a decision as to its relevant probative value. *Id.*

We now vacate the district court's denial of Murdoch's § 2254 petition, and remand this case to the district court. We instruct the district court to use its process to obtain the letter. Once the letter is obtained, the district court shall then determine in camera and as the court deems appropriate whether, as applied to the totality of facts in this case, the denial of access to Dinardo's letter resulted in an unconstitutional denial of Murdoch's Sixth Amendment right to confront witnesses.

Murdoch v. Castro, 365 F.3d at 706.

THE LETTER

Pursuant to the directive of the Ninth Circuit Court of Appeals, the magistrate judge has reviewed the letter at issue in camera. The letter is a two-page handwritten letter signed by Dino Dinardo, dated December 1, 1994, attached to a copy of what appears to be the face of an envelope in which the letter was originally enclosed. The envelope is addressed to "Kenneth Starr [sic] & Nelda Barrett." The handwriting addressed to "Kenneth Starr" on the face of the envelope appears to be different from the handwriting used to write "Nelda Barrett." "Kenneth Starr" is written in cursive script. "Nelda Barrett" is written in block printed letters. Attorney Ken Star is or was a Deputy Public Defender who represented Dino Dinardo at the preliminary hearing in this action on December 8 and 12, 1994. [CT, p. 1.] Attorney Nelda Barrett is or was a Deputy Alternate Public Defender who represented petitioner Murdoch at the same preliminary hearing. [CT, p. 1.]

The letter is subject to a claim of privilege, a claim which has been sustained by the state courts.[1] If this court were explicitly to disclose the contents of

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[1] The Ninth Circuit opinion points out that a federal habeas court cannot review the propriety of a claim of privilege based upon the state law of evidence. Murdoch v. Castro, 365 F.3d at 703, n. 1. Thus, this court cannot properly explore whether Dinardo waived his claim of privilege by addressing or possibly distributing the letter to Murdoch's counsel, Nelda Barrett. The California Court of Appeal discussed this issue and concluded that there was no waiver. [Respondent's Motion to Dismiss, filed January 15, 2000, Exh. D., p. 232-3.]

the letter, the privilege would irrevocably be breached. To preserve the privilege as best is possible, the magistrate judge will not now disclose the exact text of the letter. However, at a later point in this Third Report and Recommendation, to accomplish the task the Ninth Circuit assigned to this court, the magistrate judge discusses and analyzes the assertions in the letter to determine the "probative effect" of the letter. It should suffice at this point to say that the letter contains factual assertions regarding petitioner Murdoch's participation in the robbery-murder which are inconsistent with and which contradict Dinardo's trial testimony and Dinardo's statement to the police upon his arrest on June 30, 1994.

PROCEEDINGS IN THE STATE TRIAL COURT

The proceedings in the trial court regarding disclosure of the December 1, 1994 letter were as follows. Before opening statements in the trial, the prosecutor informed the court and petitioner's counsel that, during an interview with Dinardo, she had been told of the existence of a letter from Dinardo. The prosecutor stated that she had not actually read the letter. However, she believed that the letter said that "Dindardo was coerced by the police into implicating Defendant Murdoch in this crime." [RT 249.]

The petitioner's trial counsel was aware of the existence of the letter, but not of its contents. Before Dinardo testified, the petitioner's counsel stated his belief that Dinardo's lawyer, Jack Fuller, had the letter. The petitioner's counsel requested the court

to order Fuller to produce it. Mr. Fuller asserted a claim of work product. The trial judge ordered Fuller to deliver the letter to the court for its review. [RT 728.] Fuller then produced the letter, noting that it was delivered to Dinardo's previous lawyer, Mr. Star. [RT 751.] Fuller also noted that the envelope accompanying the letter was also addressed to Ms. Nelda Barrett, the petitioner's previous lawyer. Fuller asserted a claim of attorney-client privilege and the work product doctrine with respect to the letter. [RT 751]. After reviewing the contents of the letter, the trial judge held that the attorney-client privilege applied to the letter. [RT 768.] The trial judge further stated: "I see no exception to the attorney-client privilege, in my opinion, it's inviolate insofar as these facts are concerned . . . ." [RT 769.] The trial judge ordered Mr. Fuller to retain the letter in his possession in case it was needed in any further proceeding. [RT 769.]

PROCEEDINGS IN THE CALIFORNIA COURT OF APPEAL

In some manner that is not clear on the record before this court, the December 1, 1994 letter was submitted under seal to the California Court of Appeal while that court considered the petitioner's appeal and state habeas petition. Pursuant to this court's order, the sealed manila envelope from the California Court of Appeal and the letter contained therein have now been deposited with this court. The outside of the sealed envelope contains what appears to be the signatures of various justices of the

California Court of Appeal stating that the manila envelope was opened, read and resealed.

Attorney Barbara Perry represented petitioner Murdoch in his direct appeal. The opinion of the California Court of Appeal states, in pertinent part:

"The letter remains under seal by order of this court. On December 3, 1996, we granted Murdoch's appellate counsel access to the letter . . . . On August 1, 1997, we granted the People's request to view the outside of the envelope (but not the letter itself)".

[Respondent's Motion to Dismiss, filed January 14, 2000, Exh. D, p. 231, n.5.] The outside of the manila envelope submitted to this court contains the signature of Ms. Perry stating that she "Reviewed per ct order & resealed".

The opinion of the state of Court of Appeal contains a discussion of the applicability of the attorney-client privilege under California state law. After some discussion, the state Court of Appeal held that the letter was a statement made during the course of an attorney-client relationship, was intended to be confidential and that Dinardo had not waived the privilege. [Id., Exh. D, pp. 230-234.]

The California Court of Appeal then stated:

Finally, Murdoch claims that even if the letter fell within the attorney-client privilege, and if the privilege was not subsequently raised, his need to discover the contents of the letter outweighed Dinardo's interest in confidentiality because the letter was "directly exculpatory. It expressly

contradicted the version of events which Dinardo told at trial -- and at the time of his arrest -- with respect to apellant's culpability." In his habeas petition, Murdoch asserts the letter did even more because it "substantively exculpates petitioner." We are not persuaded. "[I]t is patent that the attorney-client privilege is not one to be easily discarded merely because a defendant asserts that invocation of the privilege results in the denial of his right to a fair trial." (*People v. Godlewski* (1993) 17 Cal.App.4th 940, 947.) "[W]e conclude that only the most extraordinary circumstance would justify disclosure of privileged communications between lawyer and client . . . ." (*Id.*, at p. 945.) We do not find such an extraordinary circumstance here. [Id., Exh. D, pp. 234-35.] This is the entire discussion by the California Court of Appeal of the petitioner's claim of a right of access to the contents of the December 1, 1994 letter.

DISCUSSION

The Ninth Circuit Court of Appeals ordered this court:

(1) to obtain the December 1, 1994 letter and to discover its contents in camera;

(2) to determine whether the contents of the letter were examined by the state courts during the petitioner's post-conviction proceedings;

(3) to determine whether the decision of the California Court of Appeal was contrary to, or involved an unreasonable application of, clearly established federal law as established by the

Supreme Court of the United States or resulted in a decision that was based on an unreasonable determination of facts in the light of the evidence presented in the State court proceeding; and

(4) to determine whether the denial of access to Dinardo's letter resulted in an unconstitutional denial of petitioner Murdoch's Sixth Amendment right to confront witnesses.

Contents of the Letter

Long Beach police officers arrested Dino Dinardo in Berkeley, California on June 30, 1994. [RT 907.] After his arrest, Dinardo made a statement inculpating petitioner Murdoch. [RT 921, 924-5.] Dinardo wrote the letter at issue in the present petition on December 1, 1994, a week or so before the joint preliminary hearing for Dinardo and Murdoch, which was heard on December 8 and 12, 1994. Murdoch's trial was in December of 1995. Dinardo testified at Murdoch's trial that Murdoch planned the robbery, that Murdoch recruited Dinardo as a participant in the robbery, that Dinardo and Murdoch committed the robbery, and that Murdoch shot and killed one of the bar patrons during the course of the robbery.

This court has read Dinardo's December 1, 1994 letter. The letter flatly contradicts Dinardo's June 30, 1994 statement and Dinardo's trial testimony regarding Murdoch's participation in the robbery-murder. The letter states that Dinardo never committed any crime with Murdoch. If the contents of the letter had been disclosed at trial to Murdoch's trial counsel, it is clear that trial counsel would have

impeached Dinardo with Dinardo's prior consistent statement in the letter. Absent the claim of privilege, it is clear that the trial court would have admitted the letter as a prior inconsistent statement.

It thus appears that the factual situation in this case is exactly as the opinion of the Ninth Circuit Court of Appeals speculated that it might be: "[t]he privileged letter is the only evidence of prior (purportedly) inconsistent statements by Dinardo regarding Murdoch's involvement in the robbery and murder." Murdoch v. Castro, 365 F.3d at 705.

State Court Review of the Letter

At trial, the trial judge apparently read the December 1, 1994 letter in camera. There is nothing in the record reflecting any attempt by the trial court to balance the petitioner's right to confront and cross-examine Dinardo using the contents of the letter, against Dinardo's attorney-client privilege. The trial court found that the letter was written within the attorney-client privilege and that there was no applicable exception to the privilege. The trial court explicitly found that the claimed privilege is "inviolate". [RT 769.] On this record, the state trial court made no attempt to balance petitioner Murdoch's right to confront witnesses using the contents of the letter against Dinardo's attorney-client privilege.

The California Court of Appeal also examined the contents of the December 1, 1994 letter during the petitioner's post-conviction proceedings. The state Court of Appeal did not explicitly attempt to weigh the petitioner's right of confrontation against

Dinardo's attorney-client privilege. The only relevant portion of the decision of the state Court of Appeal is quoted in full above. In making its determination, the decision of the state Court of Appeal quoted a couple of sentences from another state court decision, People v. Godlewski, 17 Cal.App.4th 940, 21 Cal.Rptr.2d 796 (1993). The California Court of Appeal in Murdoch's case used the Godlewski quotes to make the following conclusory determination: Disclosure of a privileged communication may only be justified by "the most extraordinary circumstance." No such extraordinary circumstance exists in this case. Therefore, the court will not order disclosure of the privileged communication. (See excerpt from California Court of Appeal decision, quoted at pp. 12-13 above.)

The Ninth Circuit Court of Appeals has ordered this court to determine whether the California Court of Appeal weighed Dinardo's claim of privilege "in the light of Murdoch's right to effective cross examination." Murdoch v. Castro, 365 F.3d at 705-6. It appears that the California Court of Appeal did not perform any process balancing Dinardo's claim of privilege against Murdoch's right of confrontation. Instead, the California Court of Appeal found that the privilege could only be disclosed by an order of the court in a "most extraordinary circumstance", a situation which it found did not exist in this case. By making a conclusory finding of the absence of a "most extraordinary circumstance", the state Court of Appeal avoided any balancing process.

This court thus answers the second and third questions put to it by the Ninth Circuit Court of Appeals as follows: The trial court and the California Court of Appeal both read the December 1, 1994 letter of Dinardo to his counsel. After reading the letter, the trial court declined to order disclosure of the letter because, in its view, the attorney-client privilege is "inviolate" or, in effect, absolute. The California Court of Appeal declined to order disclosure of the letter on the ground that there existed no "most extraordinary circumstance" justifying disclosure. This holding was not based on a process of weighing Murdoch's right to confront witnesses against Dinardo's attorney-client privilege.

In its opinion in Murdoch v. Castro, the Ninth Circuit held that the precedents of the United States Supreme Court "clearly provide that evidentiary privileges or other state laws just yield if necessary to ensure the level of cross-examination demanded by the Sixth Amendment. Id. at 702. By declining to consider whether, on the facts of this case, Murdoch's right of confrontation trumped Dinardo's right of non-disclosure of privileged communications, the decision of the California Court of Appeal "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254 (d) (1). That, however, does not end the inquiry. This court must determine whether Murdoch's right of confrontation was violated on the facts of this case.

Probative Value of Dinardo's Letter

To this point in time, the petitioner's claim regarding Dinardo's December 1, 1994 letter to his lawyer has been reviewed, in sequence, by the California Superior Court, the California Court of Appeals, the California Supreme Court, this court and the Ninth Circuit Court of Appeals. Until now, no court has attempted to determine whether the petitioner's right of confrontation was violated by failure to allow the petitioner to read an use the letter at trial. Because no court has yet made that determination, this court must now make it.

The Ninth Circuit decision in this matter stated that the ultimate issue for this court to determine is whether, on "the totality of facts in this case, the denial of access to Dinardo's letter resulted in an unconstitutional denial of Murdoch's Sixth Amendment right to confront witnesses." Murdoch v. Castro, 365 F.3d at 706. In making a decision regarding that ultimate issue, the Ninth Circuit stated that the court must make "a decision as to . . . [the] relevant probative value" of Dinardo's letter. Id. at 706. It thus appears that the Ninth Circuit adopted the test which it quoted in an earlier portion of its opinion. "'The court must ultimately decide whether the probative value of the [excluded] alleged privileged communication was such that the defendant's right to effective cross examination was substantially diminished." Id. at 703, quoting United States ex rel. Blackwell v. Franzen, 688 F.2d at 501. This court thus proceeds to determine the probative value of the Dinardo letter.

Making this determination inevitably involves disclosure of more of the contents of the letter. A determination of the probative value of the letter involves an analysis of the factual assertions in the letter and a comparison of those factual assertions with facts admitted in pre-trial or trial testimony.[2]

Dinardo's December 1, 1994 letter asserts the following facts:

(1) After Dinardo's arrest in Berkeley, Long Beach Police Detective Pavek coerced a statement from Dinardo by promising not to charge Dinardo in exchange for Dinardo's statement;

(2) In this statement, Dinardo was forced to identify petitioner Murdoch as a participant in the crime;

(3) Dinardo does not actually know Murdoch although Dinardo is aquainted with Murdoch's brother; and

(4) Murdoch and Dinardo did not commit any crime.

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[2] The opinion of the Ninth Circuit ordered this court, on the one hand, to review the letter in camera and, on the other hand, to determine the relevant probative value of the letter. Murdoch v. Castro, 365 F.3d at 706. This court issues its opinions in public documents. The court cannot fully maintain the privileged nature of the letter, while publicly discussing the relevant probative value of the letter. The best that can be done to accomplish the somewhat conflicting mandate of the Ninth Circuit is to refrain from publishing the exact words of the letter, while summarizing and discussing the factual assertions stated therein.

Detective Ronald Pavek testified at the trial that he made no promises to Dinardo during the June 30, 1994 interview:

> There were no promises made to that man [Dinardo] ever.
>
> In fact, we were very emphatic in the oral interview. I am not empowered to do anything. This is a murder-robbery We're talking about here, and the best way to help himself was to tell me exactly what happened.
>
> There was never any inferences made, there was never any promises made that if you cooperate with us, everything will go easier.
>
> We don't do that. We can't do that. We are not allowed to do that. And I couldn't do anything for him anyhow. I'm just a policeman.

[RT 917, lines 5-15.] Detective Pavek testified that, during the June 30, 1994 interview, Dinardo kept referring to a person named "Charles or Chuckie". [RT 921.] Eventually, Pavek recalled that Pavek had a group of photo mug shots in his file from the earlier investigation in 1983. Pavek showed those photos to Dinardo, including a photo of petitioner Charles Murdoch. Dinardo grabbed the photo of Murdoch and said, "That's him, that's Charles." [RT 925.] Dinardo turned the photo over and saw Murdoch's name written on the back of the photo. Pavek testified that "He [Didonato] said Murdock [sic] Murdock that's it." [RT 926.]

Dinardo testified at the petitioner's trial that, during Detective Pavek's interview with Dinardo on

June 30, 1994, Dinardo hoped to get released. Gradually, as the interview went on, Dinardo knew he would not be released. [RT 860-2, 860-7, 860-9.]

John Murdoch, the brother of petitioner Charles Murdoch, testified at the trial. John Murdoch is two years older than his brother, Charles. [RT 664.] When John Murdoch was 13 years old, Dino Dinardo played in the same neighborhood as John and Charles Murdoch. [RT 665, 667.]

Witness Patrick Condon testified at petitioner Murdoch's trial. Condon was Murdoch's former roommate, sharing a house with Murdoch in the time between 1980 and 1983. [RT 712-13.] Condon knew Dino Dinardo to be a friend of Charles Murdoch. [RT 712.] When Condon and Charles Murdoch lived together, Dinardo would come over and visit Charles Murdoch. [RT 713.]

Investigating police officers collected fingerprints from the area of the bar cash register after the robbery-murder. [RT 162, 890-91.] Fingerprints taken from the scene of the crime were matched to Dino Dinardo in 1994. [RT 898-99.]

The four factual assertions in the December 1, 1994 letter were: (1) that the police coerced Dinardo; (2) to inculpate Murdoch; (3) with whom Dinardo was unacquainted; (4) in circumstances in which Murdoch and Dinardo did not commit any crime. Of these assertions, trial testimony rebutted the first three, and half of the fourth, leaving only the assertion that Murdoch did not commit the crime. In these circumstances, the excluded letter does not appear to have significant probative value. Most

strikingly, if the petitioner had been able to present the contents of Dinardo's letter to a jury, the petitioner would necessarily have had to contend that Dinardo's trial testimony was false while the contents of the letter were true. However, the petitioner's own brother and his former roommate testified that Dinardo and Charles Murdoch were friends. The statement in the letter that letter that Dinardo did not know Charles Murdoch was false, given the testimony of the petitioner's own brother and his roommate. Moreover, at least half of the statement in the letter that Murdoch and Dinardo had not committed any crime was demonstrably false. Dinardo's fingerprint was found on or near the bar cash register. Dinardo's denial of involvement in the crime was thus patently false. The clear falsehoods undermine the credibility of every other statement in the letter.

The essential value of the December 1, 1994 letter to petitioner Murdoch was as a prior inconsistent statement of Dinardo to impeach Dindardo's trial testimony that Murdoch committed the robbery-murder. The letter contains a pre-trial statement of Dinardo stating that Murdoch was not involved in the robbery-murder. Admission of that statement into evidence in isolation clearly would have benefitted Murdoch. However, other factual statements in the letter were either contradicted by trial testimony (the assertion that the police coerced the June 30, 1994 statement from Dinardo and coerced Dinardo to inculpate Murdoch) or were demonstratively false in the light of other testimony (the assertions that Dinardo was not acquainted

with Murdoch and that Dinardo had not committed any crime). The letter is the only evidence of a prior inconsistent statement of Dinardo regarding Murdoch's involvement in the robbery-murder. However, taken as a whole, the intrinsic probative value of the letter was and is low.

If Murdoch had been able to use the letter to impeach Dinardo at trial, the impeachment value of the letter would have been markedly attenuated because of the nature of the facts Dinardo asserted in the letter. The court concludes that, given the low intrinsic probative value of the December 1, 1994 letter, the petitioner's right to effective cross-examination at the trial was not substantially diminished by the trial court's exclusion of the letter from evidence. United States ex rel. Blackwell v. Franzen, 688 F.2d at 501.

Prejudice

Even if the court were to find that the December 1, 1994 letter had significant probative value and that exclusion of the letter constituted a violation of the Confrontation Clause, the court must still determine if the petitioner suffered prejudice as a result of the trial court's exclusion of the letter from evidence. A constitutionally improper denial of a criminal defendant's opportunity to impeach a witness, like other Confrontation Clause errors, is subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. at 684. "[T]he denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of

constitutional errors that are deemed prejudicial in every case." Id. at 682.

On habeas review of trial-type errors such as that alleged here, this court must apply the harmless error standard set forth in Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). See Shumway v. Payne, 223 F.3d 982, 986 (9th Cir. 2000); Bains v. Cambra, 204 F.3d 964, 976-77 (9th Cir.), cert. denied, 531 U.S. 1037, 121 S.Ct. 627, 148 L.Ed.2d 536 (2000). Brecht forbids a grant of habeas relief for a trial-type error unless the error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. at 637.

"When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had a 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." O'Neal v. McAninch, 513 U.S. 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995).

Even if the failure to admit the letter at issue violated the Confrontation Clause, the error in failing to admit the letter was harmless. As the court has stated above, three and half out of the four assertions in Dinardo's letter were either controverted or proved to be demonstrably false at trial. Given these facts, the probative value of the letter was not substantial. In these circumstances, this court should not harbor a grave doubt whether, if the letter had been admitted into evidence and considered by the jury, the jury would have reached

a different verdict and acquitted petitioner Murdoch of the robbery-murder.

The court acknowledges that the testimony of Dinardo was probably decisive in convicting Murdoch. The trial in this case was held more than twelve years after the robbery-murder. The events took place quickly. No eyewitness claimed to be acquainted with the perpetrators before the date of the robbery-murder. At trial, there were two weak identifications of the petitioner by eyewitnesses and one somewhat stronger identification. Without Dinardo's testimony, it is questionable whether the jury would have convicted Murdoch. The prosecutor obviously believed that. Otherwise, she would not have offered to reduce Didonato's offense to manslaughter in exchange for his testimony.

Dinardo's testimony was crucial. Evidence that Dinardo had earlier told a story different from that which he told the jury might conceivably have caused the jury to doubt Dinardo's trial testimony. The difficulty in this case is that Dinardo's prior inconsistent statement was inextricably linked with other statements which either conflicted with other evidence or were demonstrably false. Given those problems, this court should not find that admission of the December 1, 1994 letter would have changed the jury's ultimate determination of Murdoch's guilt. If the court finds that the failure to admit Dinardo's letter at Murdoch's trial constituted a violation of the Confrontation Clause, the court should find that the error was harmless.

The failure of the California courts to determine whether Murdoch's right of confrontation trumped Dinardo's claim of privilege was contrary to the law of this case as found by the Ninth Circuit. However, the failure to admit the contents of the letter into evidence did not violate the Confrontation Clause because the contents of the letter did not have substantial probative value in the light of the other evidence in this case. Even if the contents of the letter are deemed to have significant probative value and the failure to admit the letter into evidence violated the Confrontation Clause, the error was harmless. The court should deny the remaining two claims of the petition.

RECOMMENDATION

The magistrate judge therefore recommends that the court issue an order: (1) approving and adopting this Third Report and Recommendation; and (2) directing that judgment be entered denying the petition on the merits with prejudice.

Dated: March 2, 2005

s/
JAMES W. McMAHON
United States Magistrate Judge

[FILED APRIL 7, 2005]

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

CHARLES MURDOCH, Petitioner, v. ROY CASTRO, Warden, et al., Respondents.	Civil No. CV-99-06900-RSWL (Mc) ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1)(C), the court has reviewed the pleadings and other papers herein, the Third Report and Recommendation of United States Magistrate Judge, and the objections thereto, and accepts and adopts the Magistrate Judge's findings, conclusions and recommendations. The court has made a de novo determination of those portions of the report as to which objection has been made.

IT IS ORDERED that the Clerk shall serve copies of this Order and the Judgment by United States Mail on the petitioner and the Attorney General for the State of California.

Dated: April 7, 2005

s/
RONALD S.W. LEW
United States District Judge

ENTERED
CLERK U.S. DISTRICT COURT
APR - 8 2005
CENTRAL DISTRICT OF
CALIFORNIA
DEPUTY

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHARLES FRANKLIN MURDOCH, JR., Defendant and Appellant.	B100877 (Super. Ct. No. NA020621) MARCH 26, 1998
In re CHARLES FRANKLIN MURDOCH, JR., on Habeas Corpus.	B112047

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles D. Sheldon, Judge. The judgment in case number B100877 is modified and, as modified, affirmed. The petition for writ of habeas corpus in case number B112047 is denied.

Barbara Springer Perry, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Robert F. Katz, Supervising Deputy Attorney General, and David Andrew Eldridge, Deputy Attorney General, for Plaintiff and Respondent.

Charles Franklin Murdoch, Jr., appeals from the judgment entered following his conviction, by jury trial, of first degree murder with special circumstances (during the commission of robbery and burglary) and attempted premeditated murder, with a principal armed finding (Pen. Code, §§ 187/190.2, subd. (a)(17), 664/187, 12022, subd. (a)(l)). Sentenced to a state prison term of life without the possibility of parole, plus one year, he contends: the in-court identification made by one eye-witness should have been suppressed as the fruit of an illegal arrest; the testimony of an accomplice should not have been admitted; the trial court improperly excluded certain evidence as protected by the attorney-client privilege; the trial judge was biased; a continuance should have been granted; a new trial motion should have been granted; evidence of an uncharged crime should not have been admitted; a consciousness of guilt instruction should not have been given; the attempted murder conviction was

barred by the statute of limitations. Murdoch has concurrently filed a habeas corpus petition that also raises the attorney-client privilege claim.

The habeas corpus petition will be denied. The attempted murder conviction will be stricken, and the judgment as modified will be affirmed.

BACKGROUND

1. *Prosecution evidence.*

On May 17, 1983, Dyanne Spence was working as a bartender at the Horseshoe Bar in Long Beach. That evening, Spence saw three men enter the bar by the back door. One man had long blond hair, another was defendant Murdoch, and the third was Mexican or Spanish. The men walked over to the jukebox, looked around and then left by the back door without ordering any drinks. Five minutes later, two of the men returned. A little later, Spence was talking to customer Edward Snow when she noticed a movement to her right. Spence turned toward the movement and saw Murdoch pointing a rifle at customer Robert Nantais. Murdoch shot Nantais and announced, "This is a robbery." Nantais ultimately died from this gunshot wound.

Murdoch then pointed the rifle at Spence and said, "Don't look at me. I will blow your f-ing head off." Snow told Spence to put her hands on the bar and look down at the floor. Spence testified she "[s]tarted to glance down but [then] looked directly at Mr. Murdoch's eyes because there was a rifle pointed in my face."

Another customer, James Hall, first realized something was going on when he noticed out of the corner of his eye a "Latino looking person" who had a small handgun. Hall looked down because he didn't want to stare at anybody. That was all he remembered. According to Spence, another one of the robbers, whom she identified as Dino Dinardo, the long-haired blond, stabbed Hall and then came behind the bar, went to the cash register and took money from the cash drawer.[1] The three robbers then fled.

Ronald Pavek of the Long Beach Police Department was one of the homicide detectives assigned to the investigation. An anonymous tip was received soon after the crime naming Murdoch as one of the perpetrators. Pavek put together a photo array containing Murdoch's picture, but neither Spence nor any of the bar patrons could make an identification. The case was thereafter designated an unsolved crime and the investigation remained dormant until 1994.

Peter Kergil, a fingerprint expert, testified the Long Beach Police Department did not have a computer system in 1983 capable of tracing fingerprints. They did not get a computer terminal with access to a central data base until 1987. In 1994, Kergil compared fingerprints taken from the Horseshoe Bar cash register with other prints in the data base. This led to the identification of Dinardo.

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[1] At both the preliminary hearing and Dinardo's trial, Spence testified she did not see the face of the man who had done the stabbing.

Kergil testified Dinardo's fingerprints matched the prints taken from the Horseshoe Bar cash register.

When he had been informed of Kergil's computer match, Pavek reopened his investigation. After Spence tentatively identified Dinardo, Pavek arrested him in Berkeley in June 1994. Dinardo admitted his involvement in the robbery and identified Murdoch, by photograph, as one of his accomplices.

Murdoch's brother, John, testified he has known Dinardo since the 1960's; John, Murdoch and Dinardo played together as kids. John had not seen Murdoch with Dinardo since that time.

Patrick Condon testified he and Murdoch have been friends since 1978. Condon knew Dinardo as one of Murduch's friends. Dinardo occasionally visited Murdoch at a residence Condon and Murdoch shared in 1984 and 1985. Condon had seen Murdoch with Dinardo in other places during 1983 on as many as ten occasions.

Dinardo testified he knew Murdoch in the early 1980's. He also said he was pretty sure he had known Murdoch in the 1970's as a kid. On May 17, 1983, Dinardo was in front of his house in West Long Beach when Murdoch came by with a Mexican-American man Dinardo didn't know. Murdoch asked if Dinardo wanted to make some money by doing "a job," which Dinardo understood to mean committing a hold-up or some other form of thievery. Murdoch and the Mexican-American man would be armed with a gun and a knife, and they wanted Dinardo to grab the money out of the cash register.

Dinardo agreed to go along. They rode in a car driven by a fourth person, another Mexican-American man Dinardo didn't know. They drove to the Horseshoe Bar. In the car, Dinardo saw Murdoch had a .22 caliber rifle and the first Mexican-American man had a knife. They wanted Dinardo to carry a knife, but he refused.

Dinardo and the man with the knife entered the Horseshoe Bar through the front door. Dinardo went to a video game machine and waited for Murdoch to arrive. Murdoch came in through the rear door two minutes later, carrying the rifle. Murdoch announced the robbery. That was Dinardo's cue to grab the money. Dinardo heard a gunshot about the time he jumped over the bar to get at the cash register. Dinardo took money and left the bar by the back door. He and the man with the knife returned to the car, which was in the alley behind the bar. Murdoch joined them about a minute later. The $200 Dinardo had grabbed from the cash register was split four ways. Dinardo did not learn anyone had been hurt in the robbery until he was arrested in 1994.

Dinardo next saw Murdoch on the weekend following the Horseshoe Bar robbery. Dinardo was playing basketball at a park with Murdoch's stepbrother. "[Murdoch] asked me how is it going, what's up, would you like to do another job with me, you know, I got a gun in my bag, and he described it as a sawed-off shotgun." Dinardo testified he declined Murdoch's offer.

When Detective Pavek first accused him of the Horseshoe Bar robbery, Dinardo lied and denied any involvement. However, after the officers convinced him they knew he was involved, he admitted his role. Dinardo also implicated someone whom he identified as Charles or Chuck; he could not recall the person's last name. When Pavek showed Dinardo a photo array, Dinardo immediately identified Murdoch's picture.

Dinardo testified he thought police were only pursuing a robbery charge against him; he said he didn't know he had been charged with murder. The officers did not tell him he was under arrest for murder, and he didn't discover this until after he had been taken to the Long Beach jail. Although the officers showed him a photo of the dead victim, they told him they knew he had not done the shooting, so he thought he was in the clear on any murder charge. Dinardo testified he didn't know anything about conspiracy and accomplice liability principles. He acknowledged he had been convicted of first-degree murder in connection with the Horseshoe Bar robbery and that he had been sentenced to a prison term of 25 years-to-life. In return for testifying against Murdoch, Dinardo acknowledged his sentence would be reduced. He had been promised a 12-year sentence which, after taking account of presentence and good time credits, meant he would be released in about five years. He understood this deal was contingent on his testifying truthfully.

2. *Defense evidence.*

An expert on eyewitness identification testimony explained the various factors affecting an eyewitness identification: the duration of the witness' observation; the lighting conditions; the stress the witness may have been experiencing during the event; whether the witness and the person identified are of the same or different races; the length of time between the crime and when the identification was made; whether the witness had seen the suspect since the time of the crime; etc.

DISCUSSION

1. *In-court identification properly admitted.*

Detective Pavek obtained a warrant for Murdoch's arrest on September 12, 1994. Three days later, Murdoch was put into a live lineup and Dyanne Spence, the bartender at the Horseshoe Bar, identified him as the person who had shot Robert Nantais. Spence subsequently identified Murdoch at trial. Murdoch contends the arrest warrant was issued without probable cause and that Spence's in-court identification should therefore have been suppressed. This claim is meritless.

A magistrate's order issuing a warrant may be set aside only if, as a matter of law, the affidavit fails to provide sufficient competent evidence to support the magistrate's finding of probable cause. (*People v. Campa* (1984) 36 Cal.3d 870, 878; *People v. McDaniels* (1994) 21 Cal.App.4th 1560, 1564.) "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual

showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause. . . ." (*Illinois v. Gates* (1983) 462 U.S. 213, 245, fn. 13 [76 L.Ed.2d 527].) A reviewing court should give great deference to the magistrate's finding of probable cause. (*People v. Glenos* (1992) 7 Cal.App.4th 1201, 1206-1207; *People v. Fernandez* (1989) 212 Cal.App.3d 984, 986.) "[A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." (*Ornelas v. United States* (1996) 517 U.S. 690 [134 L.Ed.2d 911].) A reviewing court must uphold the trial court's factual findings if they are supported by substantial evidence. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301.)

Detective Pavek's arrest warrant declaration provided the magistrate with the following information: reports of witness statements taken at the time of the robbery; an investigative report prepared at the time of the robbery; the anonymous tip accusing Murdoch which police had received soon after the robbery; Dinardo's statement to police identifying Murdoch as his accomplice in the robbery; and the identification of the fingerprints lifted from the Horseshoe Bar cash register in 1983 as belonging to Dinardo. Murdoch argues this information was insufficient to establish probable

cause of his involvement in the Horseshoe Bar robbery. We disagree.

"In *Gates*, the United States Supreme Court adopted a totality-of-the-circumstances test for assessing whether an affidavit based on hearsay establishes probable cause. [Citation.] Under the test, veracity, reliability, and basis of knowledge are intertwined factors which illuminate the practical question whether there is probable cause. . . . [Citation.] [¶] . . . [¶] Even if doubts are entertained as to an informant's motives, an explicit and detailed description of alleged wrongdoing, along with a statement the event was observed firsthand, entitles the tip to greater weight than might otherwise be the case." (*People v. Rochen* (1988) 203 Cal.App.3d 684, 688.)

According to Pavek's search warrant declaration, Dinardo had admitted his role in the Horseshoe Bar robbery and identified Murdoch as the man who had shot Nantais. Dinardo's admission against penal interest was a valid factor in gauging the reliability of his information. (See *United States v. Harris* (1971) 403 U.S. 573, 583-584 [29 L.Ed.2d 723] [although it does not always lend credibility to accusations against another, informant's admission of crime may carry indicia of credibility sufficient to establish probable cause]; *U.S. v. Tarazon* (9th Cir. 1993) 989 F.2d 1045, 1049 [admission against informant's penal interest is corroborating detail].)

In *United States v. Long* (8th Cir. 1971) 449 F.2d 288, the validity of a search warrant based on information from an admitted participant in a bank

robbery was affirmed over the claim an admitted armed robber could not be considered a credible person. "In this case, the credibility and reliability of the informant was adequately established by the disclosure in the affidavit that the informant was an admitted participant in the crime and therefore an eyewitness to most of the acts constituting the crime as described in the affidavit." (*Id.*, at p. 293.) In *United States v. Brown* (9th Cir. 1972) 455 F.2d 1201, an apparently victimized teller in a bank robbery subsequently admitted her involvement in the crime. On appeal, the defendants argued the teller's FBI statement was, by itself, insufficient to support an arrest warrant. Rejecting this claim, the appeals court reasoned the teller's "change in her original story thereby implicating herself in the crime reasonably leads to the conclusion that she was now telling the truth. Based on her admission and identity of [a defendant], probable cause existed for the issuance of the arrest warrant." (*Id.*, at p. 1203; see also *U.S. v. Laboy* (1st Cir. 1990) 909 F.2d 581,585-586 [first-hand information from untested informant constituted probable cause for warrantless arrest where informant described his own role in kidnapping].)

California cases have reached similar results. In *People v. Belmontes* (1988) 45 Cal.3d 744, Bolanos took part in a burglar that resulted in a killing. Bolanos pled guilty to burglary and received immunity from prosecution for murder. Bolanos then testified against Belmontes, who argued on appeal (in the context of an ineffective assistance of counsel claim) the warrant for his arrest "was

facially invalid because it was based solely on the uncorroborated accusation of accomplice Robert Bolanos." (*Id.*, at p. 766.) The argument was rejected. "[T]he circumstances of the crime and evidence found at the crime scene -- as summarized in the [arrest warrant] affidavit -- corroborated Bolanos's statement. Bolanos asserted the murder was committed in the course of a burglary during which McConnell's stereo was stolen and later fenced -- the affiant, Detective Holman, declared that the victim's house had been found ransacked. Bolanos stated defendant had beaten the victim with an iron bar causing defendant to become splattered with blood -- such was consistent with the nature of the victim's injury ('blunt trauma to the head') noted in the autopsy results incorporated into the affidavit. [¶] Moreover, although defendant stresses that Bolanos had a self-serving interest in 'pegging' him as the actual killer, all three participants in the burglary (defendant, Vasquez and Bolanos) shared felony-murder liability for McConnell's murder." (*Id.*, at pp. 768-769, fn. omitted.)

People v. Moore (1988) 47 Cal.3d 63, also involved an accomplice granted immunity from prosecution in exchange for testifying. As in *Belmontes*, Moore claimed to have suffered ineffective assistance of counsel because his trial attorney failed to move to suppress the fruits of a search incident to arrest on the ground the arrest warrant had been deficient under *Gates*. Moore's claim was rejected: "[T]he arrest warrant was based on information supplied by Avery, an admitted accomplice. Thus, the information was sufficient to support the issuance of

the arrest warrant. [Citing *Gates*.] Counsel was not required to bring a motion on grounds which could not prevail . . . ." (*Id.*, at p. 82.)

The fact Dinardo's fingerprints had been discovered on the Horseshoe Bar cash register corroborated his statement. So too did the information from the investigative report that police had recovered a badly damaged .22-caliber round from the bar, because this matched Dinardo's statement Murdoch had been carrying a small rifle, probably a .22. "The purpose served by corroboration is 'to establish that the information provided by the informant did not constitute a made-up story, one fabricated out of whole cloth. Corroboration of part of the information provided by the informant [gives] credibility to the remainder of the information.' [Citation.]" (*People v. Rochen*, *supra*, 203 Cal.App.3d at p. 689.)[2] In addition, there

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[2] Murdoch's reliance on *People v. Campa*, *supra*, 36 Cal.3d 870, is misplaced for two reasons. First, as a case arising before the adoption of Proposition 8, *Campa* did not apply federal principles of Fourth Amendment law. (*People v. Belmontes*, *supra*, 45 Cal.3d at 767.) Second, in *Campa* there was no corroborative information supporting the accomplice's credibility. (*Id.*, at p. 768) *Campa* itself recognized the second point: "This is not to say that in all such cases the statement of a coparticipant implicating a suspect in criminal activity should be disregarded in finding probable cause for issuance of a warrant. Admissions may be made under circumstances in which their credibility is enhanced. Other 'indicia of reliability,' such as the arrestee's record for veracity or corroborative evidence obtained independently may buttress the credibility of an arrestee's statement. Alternatively, the affidavit may provide background information describing the circumstances under which the informant's statement was

was the anonymous tip police had received soon after the robbery, which claimed a man named "Charles Murdock" had been involved in the Horseshoe Bar robbery. Murdoch asserts the anonymous tip was "discredited" because none of the witnesses, including Spence, could identify Murdoch's picture in 1983. However, we would characterize the anonymous tip as merely unhelpful in 1983. When put together in 1994 with Dinardo's statement implicating Murdoch, the 1983 tip became very helpful.

Hence, we conclude there was probable cause for issuing the arrest warrant.

2. *Dinardo's testimony properly admitted.*

Murdoch contends the trial court erred by admitting Dinardo's testimony on the ground it was inherently unreliable. This claim is meritless.

" ' "[A] defendant is denied a fair trial *if the prosecution's case depends substantially upon accomplice testimony* and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion." ' [Citation.]" (*People v. Morris* (1991) 53 Cal.3d 152, 191, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) "[W]hen an accomplice is granted immunity on

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made. In some cases, this contextual information itself will provide a sufficient basis to support a conclusion that the declarant's information is credible. This affidavit provided no such information." (*People v. Campa, supra,* 36 Cal.3d at pp. 883-884.)

condition that his or her testimony substantially conform to an earlier statement given to police, the testimony is tainted beyond redemption and its admission denies the defendant a fair trial. 'On the other hand, although there is a certain degree of compulsion inherent in any plea agreement or grant of immunity, it is clear that an agreement requiring only that the witness testify fully and truthfully is valid. [Citation.]' " (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1219.)

In *DiSantis*, the accomplice Masse was sentenced to life without possibility of parole after he was convicted at trial. He then contacted police, "saying he wanted to give a complete account of his and defendant's role in the . . . crimes, and hoped his sentence could be reduced. The officers agreed to intercede with the district attorney's office, which in turn persuaded Masse's trial judge to recall his sentence pending the outcome of defendant's trial. After the officers took a tape-recorded statement from Masse, they told him that if he wanted to receive any benefit from the statement it would have to be true and verifiable and he would have to testify against defendant." (*People v. DiSantis, supra*, 2 Cal.4th at p. 1218.) Masse was resentenced after he testified against DeSantis. On appeal, DiSantis claimed the admission of Masse's testimony was a due process violation because the mere possibility of such a greatly reduced sentence gave him a powerful inducement to commit perjury. This claim was rejected. "[F]rom Masse's perspective the degree of

compulsion was not overwhelming,[3] and *more important*, the only demand Masse understood the agreement made of him was to tell the truth. Such a bargain did not make the trial fundamentally unfair, and hence did not offend defendant's due process rights. [¶] . . . [¶] We also find of paramount significance the fact that the jury was aware of the bargain: Masse was extensively and effectively examined by defendant's counsel on his expectations of a reduced sentence following his testimony. The jury had every opportunity to discount or entirely disbelieve Masse's testimony -- an opportunity enhanced by the court's instructions that Masse was an accomplice as a matter of law and that an accomplice's testimony is to be distrusted. The jury chose to believe Masse and not defendant despite the examination and instructions." (*Id.*, at pp. 1219-1220, fn. omitted, italics added.)

The facts in the case at bar are quite similar to those in *DeSantis*. After being convicted in a separate trial for first degree murder and receiving a sentence of 25 years-to-life, Dinardo came to an agreement with the People to testify against Murdoch in return for a reduced sentence. Dinardo admitted all of this on cross-examination. Murdoch's jury was instructed Dinardo was an accomplice whose testimony was not to be trusted.

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[3] Masse expected the special circumstance finding against him to be overturned on appeal, leaving him about a 17-year term, whereas, in return for testifying, he hoped to have his sentenced reduced to 12 years in a protected custody situation.

Murdoch has not cited any authority striking down the admission of accomplice testimony in exchange for a reduced sentence such as occurred in this case. Despite accusations the People ambushed him with Dinardo's testimony, it appears Murdoch's trial attorney got discovery of all of Dinardo's police statements, knew Dinardo had turned down an offer of a reduced sentence in return for testifying against Murdoch six months before trial started, and had been advised by the prosecutor Dinardo was a potential witness. When an agreement was finally struck between the People and Dinardo, both the trial court and Murdoch's counsel were informed. Although Murdoch argues the People used, or considered using, the threat of a grant of immunity to coerce Dinardo into testifying in conformity with is police statement, it is hard to understand how this threat could have had any leverage as Dinardo was already in prison serving a life term. In any event, it is clear from the record Dinardo believed the agreement required only that he testify truthfully.

Murdoch asserts Dinardo "admitted at trial that when he gave his statement to the police, he would have said whatever it took to get out of custody, including pointing out someone else whom he thought the police wanted him to identify as being involved in the crime." Murdoch's implication -- that Dinardo admitted he was willing to lie to help himself -- is untrue. Read in context, Dinardo said no more than that he had been willing to identify an

accomplice if it would keep him out of custody.[4] We also reject Murdoch's argument his case is analogous to *Franklin v. State* (1978) 577 P.2d 860, a case discussed in *DeSantis*. The *DeSantis* opinion makes it clear why the analogy is false. "We find *Franklin* inapposite. First, though it is unclear what bargain was struck in that case, the court stated that the prosecution 'bargain[ed] for specific testimony to implicate a defendant . . . .' [Citation.] Second, there was no independent inculpatory evidence against the defendant whatever, . . . " (*People v. DeSantis, supra,* 2 Cal.4th at p. 1221, fn. 4.) Murdoch's citation of *People v. Medina* (1974) 41 Cal.App.3d 438, does not help him. That case is inapposite because it involved conditional immunity orders expressly stating the accomplices had to testify in conformity with their prior statements to police (*id.*, at p. 455).

As for Murdoch's assertion the trial court did not have the power to reduce Dinardo's sentence in these circumstances, we have already noted the almost identical resentencing that occurred in *DeSantis*. Under Penal Code section 1170, subdivision (d), a trial court "may, within 120 days of the date of commitment on its own motion . . . recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced,

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[4] Dinardo was asked whether he would have fingered "someone else that may, may have been involved in the crime," *not* whether he would have fingered an innocent person just to please the police.

provided the new sentence, if any, is no greater than the initial sentence." Under this statute, *the trial court can recall a sentence "for any reason rationally related to lawful sentencing. The court may then impose any otherwise lawful resentence suggested by the facts available at time of resentencing.*" (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 456, italics added.)

As *Dix* explained: "In sum, we see no reason to conclude that section 1170(d), contrary to its terms, limits the reasons why a trial court may exercise its statutory authority to recall and resentence. We hold that section 1170(d) permits the sentencing court to recall a sentence for any reasons which could influence sentencing generally, even if the reason arose after the original commitment. The court may thereafter consider any such reason in deciding upon a new sentence [and] . . . impose any new sentence that would be permissible under the Determinate Sentencing Act if the resentence were the original sentence. [¶] Accordingly, even if the recall of Bradley's prison sentence was prompted by Bradley's postcommitment offer of testimony in another case, the court's action did not exceed its jurisdiction under section 1170(d). Nor is the court precluded by section 1170(d) from taking Bradley's cooperation into account when imposing any new sentence." (*Dix v. Superior Court, supra,* 53, Cal.3d at p. 463, fn. omitted; cf. *People v. Pritchett* (1993) 20 Cal.App.4th 190, 194-195 [trial court abused its discretion by recalling sentence solely to extend defendant's time for filing notice of appeal, "a reason completely unrelated to sentencing"].)

Dix also teaches that even if there were a jurisdictional problem with Dinardo's resentencing, Murdoch lacks standing to raise the issue. Dix had been the victim of an aggravated assault by Bradley. The trial court recalled Bradley's prison sentence after he offered to testify in an unrelated case. Dix sought, by writ petition, to overturn the recall order and prevent substitution of a new sentence. But the Supreme Court concluded Dix, "who is not a party to Bradley's criminal case, has no standing to challenge the application of section 1170(d) to Bradley's sentencing." (*Dix v. Superior Court, supra,* 53 Cal.3d at p. 450.) The same rule would appear to apply to Murdoch.

3. *Attorney-client privilege properly upheld.*

Prior to opening statements, the prosecutor informed the trial court and defense counsel she had discovered, during an interview with Dinardo, the existence of a letter in which Dinardo apparently claimed he had been coerced by police into implicating Murdoch. This letter was in the possession of Jack Fuller, Dinardo's lawyer, who asserted the attorney-client privilege on Dinardo's behalf. The trial court ruled the letter was entitled to the privilege, a decision Murdoch contends was incorrect. This claim is meritless.[5]

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[5] The letter remains under seal by order of this court. On December 3, 1996, we granted Murdoch's appellate counsel access to the letter. On April 1, 1997, we denied Murdoch's motion to unseal the letter, ruling he had failed to show the attorney-client privilege had been waived. On August 1, 1997,

"Under [Evidence Code] section 954, a client holds a privilege to prevent the disclosure of confidential communications between client and lawyer . . . . '[C]onfidential communications' include 'information transmitted between a client and his or her lawyer in the course of that relationship and in confidence' (§ 952)." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1207.) "As to the attorney-client privilege, a client -- whether or not he is a party to a particular proceeding -- has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication to or from the lawyer -- and it is the lawyer's duty to claim the privilege on his client's behalf whenever necessary to prevent an unauthorized disclosure. (Evid. Code, §§ 954, 955.) Assuming the requisite relationship and confidential communication, the privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case. [Citation.] The term 'confidential communication' is broadly construed, and communications between a lawyer and his client are presumed confidential, with the burden on the party seeking disclosure to show otherwise. [Citations.]" (*Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557.)

The trial court's ruling on a question of evidentiary privilege is reviewed for abuse of discretion. (*People v. Mickey* (1991) 54 Cal.3d 612, 654.) "On appeal, the scope of judicial review is

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we granted the People's request to view the outside of the envelope (but not the letter itself).

limited. 'When the facts, or reasonable inferences from the facts, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it [citations].' [Citation.]" (*People v. Gionis, supra,* 9 Cal.4th at p. 1208, fn. omitted.)

Murdoch first claims the record fails to establish Dinardo's letter was actually privileged. In this regard, Murdoch asserts the party claiming the privilege has the burden of showing the privilege should be given in the particular case. He relies on this language from *Gionis*: "Although the attorney-client privilege is essential to our system of justice, it can and does result in the withholding of relevant information from the fact finder. Therefore, '[t]he party claiming the privilege carries the burden of showing that the evidence which it seeks to suppress is within the terms of the statute.' [Citations.]" (*People v. Gionis, supra,* 9 Cal.4th at p. 1208.) But the question in *Gionis* was whether the statement at issue had been made during the course of an attorney-client relationship. Here, there is no dispute the statements had been made during the course of any attorney-client relationship (that is, the statements were made by Dinardo in a letter delivered to his then-defense counsel, Kenneth Star, who later gave the letter to Fuller, Dinardo's current attorney). The only question here is whether the statements were intended to be confidential. And on

that question Evidence Code section 917[6] creates a presumption that attorney-client communications are privileged and places on the opponent of the privilege the burden of proving a communication was *not* privileged. (*North v. Superior Court* (1972) 8 Cal.3d 301, 310; *Geilim v. Superior Court* (1991) 234 Cal.App.3d 166, 176.)

Murdoch first argues that we know the letter was not meant to be confidential because "in initially disclosing the existence of the letter, the prosecutor stated that Dinardo had told her he prepared the letter 'at the request and assistance' of [Murdoch]:" based on this. Murdoch asserts his own "participation or consultation in the preparation of the letter took it outside the privilege ab initio, despite its later delivery to Dinardo's attorney." However, "request and assistance" does not necessarily mean Murdoch actually helped write the letter or had any other role in its production. Dinardo's rather ambiguous statement could mean any number of things. It does not prove he did not intend the contents of the letter to be confidential.

Murdoch then argues the actual delivery of the letter proves it was not meant to be confidential.

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[6] Evidence Code section 917 provides: "Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, or husband-wife relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential."

Although the letter had been delivered to Dinardo's former attorney, Kenneth Star, it was inside an envelope which had been addressed to both Star and Murdoch's former attorney, Nelda Barrett. Murdoch argues, "By delivering the letter addressed in this fashion, Dinardo impliedly authorized his attorney to disclose its contents to appellant's counsel." However, the names of Star and Barrett appear to have been written by very different hands. And if anything, Star's name appears to have been written in the same hand as the letter itself; it is Barrett's name which appears to have been written by someone other than Dinardo. Thus, the more logical inference from this evidence is actually that Dinardo intended the letter to be a confidential attorney-client communication.

Lastly, Murdoch argues "the entire tenor of the letter itself bespeaks an intention on Dinardo's part to make its contents public." However, whatever implications may be read into the letter tin his regard are, at a minimum, offset by Dinardo's delivery of the letter only to his own attorney. Given the presumption contained in section 917, we conclude the trial court did not abuse its discretion by finding the letter was intended to be confidential. (*See People v. Mickey, supra*, 54 Cal.3d at p. 654.)

Murdoch next claims that even if the letter had originally been privileged, Dinardo subsequently waived the privilege by his "partial oral disclosure of its contents to the prosecutor." No so. Murdoch asserts: "[T]he prosecutor stated to the court that she had learned of both the existence of the letter

and its contents from her interview with Dinardo. Subsequent disclosure of an originally privileged communication to a third party waives the privilege." But the prosecutor did not tell the trial court she knew what the letter said. The prosecutor only stated, "[I]t's my understanding -- I have never read the letter, I've never seen the letter, nor do I have a copy of the letter, . . . -- but that the letter I guess in sum and substance stated that Mr. Dinardo was coerced by the police into implicating defendant Murdoch in this crime." Hence, the prosecutor only related to the trial court her "understanding" and her "guess." Moreover, the People point out Murdoch did not assert this theory of admissibility at trial, which Murdoch does not dispute, and hence there was no effort by the trial court to clarify precisely what Dinardo told the prosecutor. " '[I]t is an elementary rule that ordinarily matters not presented to the trial court and hence not a proper part of the record on appeal will not be considered on appeal.' (*People v. Brawley* (1969) 1 Cal.3d 277, 294.) This rule recognizes that an appellate court is in fact a reviewing court and hence should not go outside the record to resolve questions not presented to the trial court. (*People v. Pearson* (1969) 70 Cal.2d 218, 221-222, fn. 1.)" (*People v. Webb* (1986) Cal.App.3d 401, 410).

Finally, Murdoch claims that even if the letter fell within the attorney-client privilege, and if the privilege was not subsequently waived, his need to discover the contents of the letter outweighed Dinardo's interest in confidentiality because the letter was "directly exculpatory. It expressly

contradicted the version of events which Dinardo told at trial -- and at the time of his arrest -- with respect to appellant's culpability." In his habeas petition, Murdoch asserts the letter did even more because it "substantively exculpates petitioner." We are not persuaded. "[I]t is patent that the attorney-client privilege is not one to be easily discarded merely because a defendant asserts that invocation of the privilege results in the denial of his right to a fair trial." (*People v. Godlewski* (1993) 17 Cal.App.4th 940, 947.) "[W]e conclude that only the most extraordinary circumstance would justify disclosure of privileged communications between lawyer and client . . . ." (*Id.*, at p. 945.) We do not find such an extraordinary circumstance here.

4. *No due process violation based on judicial bias.*

Murdoch contends he was denied due process because of judicial bias. He claims the trial court's bias against him manifested itself when the court: participated in the unlawful sentencing arrangement which led to Dinardo's testimony; suppressed evidence Murdoch needed to prepare and present his defense (including the letter held inadmissible under the attorney-client privilege); failed to grant a continuance necessary for trial preparation; refused to follow statutory judicial disqualification procedures; and, improperly handled Murdoch's new trial motion. This contention is meritless.

We have already determined the trial court had a reasonable basis for concluding Dinardo's resentencing was proper.

Murdoch argues the trial court suppressed important evidence by keeping from defense counsel the fact that People had made "promises" to Dinardo. However, the prosecutor only told the trial court an offer had been made to Dinardo; she did not report any final agreement. Murdoch cites no authority requiring the defense to be informed about the progress of negotiations that might or might not result in an agreement to have an accomplice testify. The trial court here accurately reported no binding promises had yet been made.

We have already determined the trial court properly ruled Dinardo's letter to his attorney was privileged.

We will conclude, below, the trial court properly denied Murdoch's request for a continuance.

Murdoch's claim regarding the trial court's alleged failure to follow proper statutory procedures (see Code Civ. Proc., § 170.1 et seq.) for disqualifying judges is not cognizable on this appeal. "Under our statutory scheme, a petition for writ of mandate is the exclusive method of obtaining review of a denial of a judicial disqualification motion." (*People v. Mayfield* (1997) 14 Cal.4th 668, 811.) "Section 170.3(d) forecloses appeal of a claim that a *statutory* motion for disqualification authorized by section 170.1 was erroneously denied, and this preclusion applies even when the statutory basis for the motion appears to codify due process grounds for challenging the impartiality of a judge. [Citations.]" (*People v. Brown* (1993) 6 Cal.4th 322, 334.)

Finally, Murdoch claims the trial court revealed its bias by the comments it made while denying his new trial motion. But the challenged comments relate to the other examples of alleged bias we have already commented on, and Murdoch points to nothing that would sustain his assertion the trial court's comments "reflect[ed] a continuing effort not only to suppress the evidence essential to appellant's defense, but also to prevent any examination into the question of the court's own bias."

In sum, Murdoch claims he has "demonstrate[d] that Judge Sheldon had prejudged appellant's guilt long before the trial started, that he joined the prosecution's efforts to bring about appellant's conviction by active assistance in procuring the evidence essential to conviction, while suppressing and sealing any evidence that could have produced another verdict." We fail to see how any of this has been demonstrated.

5. *Continuance properly denied.*

Murdoch contends the trial court erred by denying his request for a continuance to prepare for Dinardo's testimony. This claim is meritless.

The grant or denial of a motion for a continuance is within the sound discretion of the trial court and may only be granted on a moving party's showing of good cause, which requires a demonstration that both the party and counsel have been diligent in preparing for trial. On appeal, the trial court's ruling is reviewed for abuse of discretion. (*People v. Mickey*, *supra*, 54 Cal.3d at p. 660.) A trial court is not required to automatically accept every

representation that counsel is not prepared to go to trial. (See Pen. Code, § 1050; *People v. Howard* (1992) 1 Cal.4th 1132, 1171-1172.)

Murdoch argues his trial attorney "sought the information necessary to prepare his defense as soon as he learned that there was a possibility that Dinardo would testify." Not so. As the record demonstrates, counsel knew months earlier the People had made an offer to reduce Dinardo's sentence if he would testify against Murdoch. Counsel also knew Dinardo had already been convicted by a jury of first degree murder for his part in the Horseshoe Bar robbery. In addition, the prosecutor had apparently indicated early on she intended to call Dinardo as a witness. The trial court found it was "absolutely clear from the beginning of this case, from the time you first undertook it . . . that there was a possibility [Dinardo] might testify." We agree. It appears the continuance request came only after it was absolutely certain Dinardo would testify.[7]

6. *Ruling on new trial motion.*

Murdoch contends the trial court should have recused itself from hearing a new trial motion predicated on the court's own bias. "Instead, the judge, in essence, became a witness before himself,

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[7] Contrary to Murdoch's assertion, defense counsel had been informed of Dinardo's past dealings with law enforcement. The prosecutor said she had no information that Dinardo had testified in any other case. At an evidentiary hearing, Dinardo testified none of his prior offenses involved codefendants and that he had not given police information about anyone else.

making factual statements about matters known personally to him, while leaving appellant bereft of his . . . right to cross-examine." This claim is meritless. It appears Murdoch waived this claim by not objecting below to the trial court's hearing the new trial motion. The People assert there was no objection, Murdoch does not dispute the assertion, and we find no evidence of an objection. Moreover, defense counsel acknowledged at the hearing he was "not contending that this court was actually biased because, obviously, I have no facts to indicate that."

7. *Sufficient evidence of special circumstance findings.*

Murdoch contends there was insufficient evidence to sustain the special circumstance findings (murder during the commission of robbery and burglary) because the jury returned a "not true" finding on the accompanying firearm use allegation. From this, Murdoch concludes the jury must have believed he did not shoot the victim, but had merely been an aider and abettor. Not true. "Inconsistent findings by the jury frequently result from leniency, mercy or confusion. [Citation.] Such inconsistencies in no way invalidate the jury's findings. Therefore, any inconsistency between the jury's findings could not have supported the trial court's decision to grant a new trial on the murder count since the trial court also found that the jury's verdict was supported by substantial evidence." (*People v. York* (1992) 11 Cal.App.4th 1506, 1510 [inconsistency between murder conviction and special circumstance finding does not invalidate murder conviction].)

8. *Other crimes evidence proper.*

Murdoch contends the trial court erred by allowing Dinardo to testify that, on the weekend following the Horseshoe Bar robbery, Murdoch solicited Dinardo's participation in another crime. Murdoch argues this evidence had no relevance to the charged offenses and therefore constituted impermissible "propensity" evidence. This claim is meritless. Dinardo testified Murdoch asked him if he wanted to "do another job," meaning another robbery. This evidence was relevant because it showed Murdoch's acknowledgement of his participation in the Horseshoe Bar robbery.

9. *Consciousness of guilt instruction proper.*

Murdoch contends the trial court erred by giving the jury a consciousness of guilt instruction grounded on the allegation Murdoch tried to suppress evidence by changing his appearance. This claim is meritless.

CALJIC No. 2.06 is proper when evidence exists that, if believed by the jury, would support the suggested inference of guilt. (*People v. Crandell* (1988) 46 Cal.3d 833, 870-871.) "Whether or not any given set of facts may constitute suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of a defendant is a question of law. Thus in order for a jury to be instructed that it can infer a consciousness of guilt from suppression of adverse evidence by a defendant, there must be some evidence in the record which, if believed by the jury, will sufficiently support the suggested inference.

Furthermore, the determination of whether there is such evidence in the record is a matter which must be resolved *by the trial court before* such an instruction can be given to a jury." (*People v. Hannon* (1977) 19 Cal.3d 588, 597-598.) A change in a defendant's appearance between the commission of the crime and the trial is evidence from which a trier of fact may infer consciousness of guilt. (*People v. Randle* (1992) 8 Cal.App.4th 1023, 1036 [evidence defendant's hairstyle had changed during pendency of case]; *People v. Slutts* (1968) 259 Cal.App.2d 886, 893 [consciousness of guilt reasonably inferred where defendant shaved off beard shortly after crime committed].)

Murdoch argues there was no evidence to support such an instruction. In the trial court, the People argued various photographs taken of Murdoch over the years showed significant changes in his appearance. Defense counsel argued Murdoch's hair was only slightly different, and emphasized the many years that had gone by. The trial court remarked it was allowing the instruction "because I look at the pictures and, of course, I was able to see the defendant here in court." This was the proper inquiry before giving the jury the consciousness of guilt instruction.

Murdoch also argues he was prejudiced because several photographs pictured him wearing jail clothes or with unkempt grooming. He complains, "The instruction did not specify which change in appearance the jury could consider; it left the jury free to draw the inference consciousness of guilt from

the change appellant's clothing. In other words, it permitted the jury to draw a negative inference from appellant's exercise of his constitutional right to appear in civilian dress at trial." We are not persuaded that showing the jury a photo of Murdoch wearing jail clothes completely undermined the effect of his wearing civilian clothes at trial. In any event, if an instruction correct in law required clarification, it was up to Murdoch to ask for a modification during trial. "A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Lang* (1989) 49 Cal.3d 991, 1024.)

10. *Ex post facto claim.*

Murdoch contends his conviction for premeditated attempted murder (arising out of the stabbing of James Hall, the second victim) must be reversed because it violated the statute of limitations. The People disagree, although they concede the trial court improperly imposed a life sentence for this conviction because at the time of the Horseshoe Bar robbery the maximum penalty for attempted murder was nine years. We agree with Murdoch's claim the conviction itself was barred.

In 1983, attempted murder was punishable by a prison term of five, seven or nine years, and carried

a statute of limitations of three years.[8] In 1984, the Legislature did two things. It extended the statute of limitations applicable to attempted murder to six years,[9] and, by enacting Penal Code section 799, it did away with any statute of limitations for offenses carrying a possible life term. Then in 1986, the Legislature amended Penal Code section 664 -- the general "attempt" statute -- to provide "that when the crime attempted is 'willful, deliberate, and premeditated murder,' the person guilty of that attempt shall be subject to the punishment of imprisonment for life with the possibility of parole. [Citation.]" (*People v. Bright* (1996) 12 Cal.4th 652, 656.)

From these facts, Murdoch argues the statue of limitations on his 1983 attempted murder ran on May 17, 1989 under section 800, while the People argue the non-limit of section 799 applies. Both sides agree on the legal difference between extending an existing limitations period and resurrecting a limitations period that has lapsed. " 'It is settled law in California that a criminal statute of limitations period, in effect on the date of an alleged offense, may lawfully be extended before, but not after, it has run as to the offense.' " (*People v. Bunn* (1997) 53 Cal.App.4th 227, 235.) The People argue the 1986

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8 Under former Penal Code section 800, the statute of limitations was three years for felonies not otherwise dealt with expressly.

9 Penal Code section 800 provides for a six-year statute of limitations for offenses carrying a possible penalty of eight years of more.

amendment "indirectly" extended an "existing limitations period." We disagree.

As *Bunn* explained, "There is . . . a principled distinction to be drawn between the two types of enactments. An amendment extending the limitations period for a . . . charge as to which the previously applicable statute of limitations has expired *re*criminalizes conduct that, by lapse of time and operation law, has been rendered exempt from prosecution -- and punishment -- for all time. When an amendment operates to extend an unexpired statute of limitations, the new law reminds offenders that they are subject to prosecution and punishment for relatively recent conduct, and places them on notice that they will remain so for a longer period of time than anticipated at the time of the offense. As Judge Learned Hand explained in *Falter v. United States* (2d Cir. 1928) 23 F.2d 420, 'Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease on life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the stake forgives it.' [Citation.]" (*People v. Bunn*, supra, 53 Cal.App.4th at p. 237.)

Following the reasoning of *Bunn*, we conclude the statue of limitations contained in section 799 cannot be applied to a 1983 attempted murder. In 1984,

Murdoch faced a possible sentence of five, seven or nine years if convicted of attempted murder in a prosecution commenced by May 1989. In 1986, anyone *thereafter* committing premeditated attempted murder faced a possible life sentence; and anyone so charged could, pursuant to section 799, be prosecuted at any time. The People argue, "[I]f there is no constitutional violation when a limitation period is extended *directly* via an amendment to one statute in 1984, there can be no reasoned claim of such a violation when the same practical consequence -- i.e., another extension of the limitation period -- is accomplished *indirectly* via an amendment to another statute in 1986." But if, as the People concede, the 1986 amendment creating a life term for premeditated attempted murder cannot be applied to Murdoch without violating ex post facto principles,[10] how can the 1986 enactment be said to have put him on notice the statute of limitations applicable to his 1983 crime had been extended? How can the new 1984 limitations period apply to him when the statute in which it is contained did not apply to him when it was enacted and is only linked to him by a 1986 statute which also cannot be applied to him? In the words of Judge Hand, such a result would offend our notions of justice and fair play.

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[10] The 1986 amendment to the attempt statute established for the first time an increased penalty for attempted murder if the jury made the further determination the murder attempted had been premeditated. (*People v. Bright*, *supra*, 12 Cal.4th at pp. 665-669.)

DISPOSITION

The attempted murder conviction is stricken. As so modified, the judgment is affirmed. The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KLEIN, P.J.

We concur:

CROSKEY, J.

KITCHING, J.

Second Appellate District, Division Three,
No. B100877/B112047
SO6996

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
JUL - 8 1998
Robert Wandruff Clerk
Deputy

In Re CHARLES FRANKLIN MURDOCH JR.

On Habeas Corpus

THE PEOPLE, Respondent
v.
CHARLES FRANKLIN MURDOCH, Appellant.

Appellant's petition for review DENIED.

GEORGE
Chief Justice

186 (2)

No. 10-809

Supreme Court, U.S.
FILED
APR 15 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

CHARLES FRANKLIN MURDOCH, JR., *Petitioner*,

v.

ROY CASTRO, WARDEN, AND
EDMUND G. BROWN JR., ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX

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QUESTIONS PRESENTED

1. In a federal habeas corpus proceeding, does 28 U.S.C. § 2254(d) deference apply to a state court's rejection of a federal constitutional claim on direct appeal that cites the section of the petitioner's brief raising the claim, and then discusses and applies a state case where the court rejected the same federal constitutional claim?

2. Is there clearly established Supreme Court law extending a criminal defendant's Sixth Amendment right of confrontation to defense discovery, notwithstanding *Pennsylvania* v *Ritchie*, 480 U.S. 39 (1987)?

3. Assuming arguendo an implied restriction on cross-examination in this case, is there clearly established Supreme Court law holding that a criminal defendant's Sixth Amendment right to confrontation unconditionally trumps another criminal defendant's attorney-client privilege?

TABLE OF CONTENTS

Page

Statement of the Case 1

Reasons for Denying Certiorari 8

I. Because the California Court of Appeal adjudicated petitioner's confrontation claim on the merits, the alleged circuit split on whether an unadjudicated claim deserves deference is not presented here 8

II. Because the Confrontation Clause does not extend to discovery, the California Court of Appeal could not have contradicted or unreasonably applied any clearly established authority of this Court 16

A. The trial court did not restrict petitioner's cross-examination of Dinardo; accordingly, the California Court of Appeal's decision is entirely consistent with this Court's precedent 17

B. Even if petitioner's confrontation rights were implicated, this Court has not squarely addressed the relationship between a criminal defendant's rights to cross-examine and the attorney-client privilege; thus, the state court could not have unreasonably applied this Court's precedent 20

C. Even assuming *Smith* and *Davis* constitute clearly established federal law governing petitioner's claim, relief is barred by § 2254(d) 27

Conclusion 32

TABLE OF AUTHORITIES

Page

CASES

Brady v *Maryland*
373 U.S. 83 (1963) ... 19

Carey v. *Musladin*
549 U.S. 70 (2006) ... 21, 26

Chambers v *Mississippi*
410 U.S. 284 (1973) ... 27

Chapman v. *California*
386 U S. 18 (1967) ... 31

Davis v *Alaska*
415 U.S. 308 (1974) ... passim

Delaware v. *Fensterer*
474 U.S. 15 (1985) ... 27

Delaware v. *Van Arsdall*
475 U.S 673 (1986) ... 31

Fry v. *Pliler*
551 U.S. 112 (2007) ... 31

Greene v. *McElroy*
360 U S 474 (1959) ... 31

Harrington v *Richter*
131 S. Ct 770 (2011) ... 13, 15

Jenkins v. *Wainwright*
763 F.2d 1390 (11th Cir. 1985) ... 29

Kane v *Garcia Espitia*
546 U.S 9 (2005) ... 26

TABLE OF AUTHORITIES
(continued)

Page

Murdoch v. *Castro*
365 F.3d 699 (9th Cir 2004)... 5

Murdoch v *Castro*
489 F.3d 1063 (9th Cir. 2007). 7

Murdoch v *Castro*
609 F.3d 983 (9th Cir. 2010)... ... ... .passim

Neku v *United States*
620 A.2d 259 (D.C. 1993)..... 10

Newton v. *Kemna*
354 F.3d 776 (8th Cir. 2004).... . ... 25, 26

Pennsylvania v. *Ritchie*
480 U.S 39 (1987)..... .... .17, 18, 19, 20

People v. *Godlewski*
17 Cal. App. 4th 940,
21 Cal Rptr. 2d 796 (1993) . . . .passim

Schriro v *Landrigan*
550 U S 465 (2007).... 26

Smith v. *Illinois*
390 U S 129 (1968).... . .. . 21, 22, 24, 27

Swidler & Berlin v. *United States*
524 U S 399 (1998)... . ...24, 25, 26, 28

Teague v. *Lane*
489 U S. 288 (1989).... 19

United States ex rel. Blackwell v. *Franzen*
688 F 2d 496 (7th Cir. 1982). 9, 10, 28

United States v. *Ranoine*
32 F.3d 1203 (7th Cir 1994).. 28

TABLE OF AUTHORITIES
(continued)

Page

Upjohn Co v. *United States*
449 U.S 383 (1981). 18, 28

Wright v. *Van Patten*
552 U S. 120 (2008)..... 26

STATUTES

28 U.S.C. § 2254.. ..... passim
Cal. Penal Code
§ 187 1
§ 190 2 1
§ 664 1

CONSTITUTIONAL PROVISIONS

U.S. Const.
amend V. 5
amend VI 4, 5

OTHER AUTHORITIES

Antiterrorism and Effective
Death Penalty Act of 1996..... 15, 26, 30

INDEX TO SUPPLEMENTAL APPENDICES

	Page
SUPPLEMENTAL APPENDIX A	
Excerpts from the Reporter's Transcript	1-68
SUPPLEMENTAL APPENDIX B	
Excerpts from Appellant's Opening Brief	69-88
SUPPLEMENTAL APPENDIX C	
Excerpts from the Petition for Writ of Habeas Corpus	89-94

STATEMENT OF THE CASE

In 1983, four men, including petitioner and Dino Dinardo, robbed the Horseshoe Bar in Long Beach, California. During the robbery, petitioner shot and killed Robert Nantais, a bar patron. Petitioner also threatened to shoot and kill bartender Dyanne Spence. Another robber ordered James Hall to retrieve a bill from the floor and stabbed him several times. Dinardo removed cash from the cash drawer. The men fled the bar. The robbery remained unsolved for approximately eleven years.

In 1994, a fingerprint expert at the Long Beach Police Department compared fingerprints taken from the cash register at the Horseshoe Bar with fingerprints in a central database. Dinardo's fingerprints were identified as the ones taken from the cash register. In June 1994, Dinardo was arrested in Berkeley, California. He admitted his involvement in the robbery and identified petitioner as one of his accomplices.

Petitioner was charged with murder in violation of California Penal Code section 187(a) and attempted premeditated murder in violation of California Penal Code sections 187(a) and 664. Petitioner was also charged with the special circumstance that the murder occurred during the commission of a robbery within the meaning of California Penal Code section 190.2(a)(17).

Before opening statements, the prosecutor informed the trial court and counsel that during an interview with Dinardo, she learned Dinardo had written a letter "at the request and assistance of [petitioner]" and that the letter "in sum and substance stated that [] Dinardo was coerced by the police into implicating [petitioner] in this crime." The prosecutor had not read the letter and did not

have a copy. She also stated that the information pertained to possible impeachment (See Cert. Pet., App. 79; Supp. App. at 1-2.) Petitioner's counsel did not respond to the prosecutor's statements regarding the letter. (Supp. App. at 2.)

Dinardo testified for the prosecution. During a sidebar conference about discovery before Dinardo was called to testify, the prosecutor stated she did not know whether petitioner's counsel ever received a copy of Dinardo's letter, but if he had, she asserted the prosecution would also be entitled to see it. Petitioner's counsel stated, however, that he did not have a copy. (Supp. App. at 3.) There was no further discussion about the letter at that time. (Supp. App. at 3.)

Just before Dinardo's direct examination, petitioner's trial counsel requested a copy of the letter and asked the court to order Dinardo's attorney, Jack A. Fuller, to produce the letter because he believed it contained an inconsistent statement. (Supp. App. at 4; see Cert. Pet.; App. 79-80.) Mr. Fuller did not have the letter in court but stated that, as he had already advised petitioner's trial counsel, Stephen Peacock, given "[t]he conditions under which it was produced" he did "not believe" the letter was a "*truthful restatement of what occurred.*" (Supp. App. at 4, emphasis added.) Mr. Fuller also asserted a claim of work product. (Cert. Pet., App. 80.) The trial court ordered Mr. Fuller to turn the letter over to the court so it could review the letter to determine whether any portion of it could be disclosed. (Cert. Pet., App. at 80; Supp. App. at 5.)

The prosecution proceeded with Dinardo's direct examination. Before cross-examination, petitioner's attorney asked the court to rule on whether the letter would be disclosed so that he would know what he could ask during cross-

examination. Dinardo's attorney asserted that the letter was protected by the attorney-client privilege and requested that the court refrain from ordering that it be produced to anyone. The court took the issue under submission and petitioner's trial counsel began Dinardo's cross-examination. (Supp. App. at 6-8.) During a recess, the trial court ruled that the letter was protected by the attorney-client privilege. The court further found that no exception to the attorney-client privilege applied. The court did not prohibit or restrict trial counsel from asking Dinardo any questions during cross-examination. The court returned the letter to Mr. Fuller and ordered him to retain the letter in case it was needed in any further proceedings. (Cert. Pet., App. 80; Supp. App. at 30.)

Dinardo's cross-examination continued. Petitioner's trial attorney did not attempt to cross-examine Dinardo about the statements in the letter. Nor did he ask Dinardo any questions about what Dinardo told the prosecutor about the letter. (Supp. App. at 8-29, 32-66.) But trial counsel thoroughly cross-examined Dinardo by impeaching him with questions regarding his motivation for testifying in this case and his credibility generally. (*Id.*) The first question that counsel asked Dinardo was whether he had been convicted of first degree murder based on the same charges that petitioner was facing. Dinardo admitted he had. (Supp. App. at 8.) Counsel elicited that in exchange for Dinardo's testimony his conviction would be reduced from first-degree murder to manslaughter. Dinardo also admitted that his sentence was being reduced from 25 years to life to 12 years and that, with time served, he expected to be released in just five years. Counsel further elicited that Dinardo would have "pretty much" spent the rest of his life in prison had he not testified against petitioner. (Supp. App. at 10.)

Counsel asked Dinardo, "Your purpose for being here today and testifying that Mr. Murdock [*sic.*] was one of the people in the bar is so you can get out of prison early; isn't that right." (Supp. App. at 16.) Dinardo replied, "Yes." (*Id.*) Counsel also elicited testimony from Dinardo that he had initially repeatedly denied his involvement in the robbery to the police. (Supp. App. at 17-19.) Counsel also impeached Dinardo with his prior convictions.

The jury convicted petitioner of first-degree murder and attempted premeditated murder. Petitioner was sentenced to state prison for life without parole.

Petitioner appealed his state convictions to the California Court of Appeal. Petitioner claimed, *inter alia*, that his Sixth Amendment right to confront Dinardo was violated because he was denied access to Dinardo's letter, which could have been used to cross-examine him. Petitioner argued that his right to cross-examine Dinardo took precedence over Dinardo's attorney-client privilege. (Supp. App at 69-89.) In a companion petition for writ of habeas corpus, petitioner reasserted the same claim. (Supp. App. at 90-94.) The California Court of Appeal rejected petitioner's claim finding that "only the most extraordinary circumstance would justify disclosure of the privileged communication between lawyer and client," and that such circumstances did not exist in petitioner's case. (Cert. Pet., App. at 123.) The state appellate court also denied the habeas petition that raised the same claim. The state appellate court affirmed the judgment, but struck the attempted-murder conviction as barred by the statute of limitations. (Cert. Pet., App. at 80-81.) On July 8, 1998, the California Supreme Court denied review. (Cert. Pet., App. at 116.)

Petitioner then filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. As relevant here, petitioner claimed that his Fifth and Sixth Amendment rights were violated by the trial court's ruling that Dinardo's letter was protected by the attorney-client privilege. (Cert. Pet., App. at 71.)

The district court denied the petition. The Court of Appeals for the Ninth Circuit granted a certificate of appealability on one issue: "Whether appellant's federal constitutional rights were violated when the trial court ruled that prosecution witness Dinardo's letter was protected by attorney-client privilege." Later, a Ninth Circuit panel ruled as follows:

> We now vacate the district court's denial of Murdoch's § 2254 petition, and remand this case to the district court. We instruct the district court to use its process to obtain the letter. Once the letter is obtained, the district court shall then determine in camera and as the court deems appropriate whether, as applied to the totality of facts in this case, the denial of access to Dinardo's letter resulted in an unconstitutional denial of Murdoch's Sixth Amendment right to confront witnesses.

Murdoch v. *Castro*, 365 F.3d 699, 706 (9th Cir. 2004) (*Murdoch I*).

On remand, a magistrate judge reviewed the letter *in camera*. The magistrate judge issued a report recommending denial of the petition, which was adopted by the district court. In the report, the court found that the California Court of Appeal's decision was contrary to, or involved an unreasonable application of clearly established Federal law, because the state appellate court did not consider

whether petitioner's "right of confrontation trumped Dinardo's right of non-disclosure of privileged communications[.]" (Cert. Pet., App. at 86.) The court nevertheless rejected petitioner's claim under a de novo standard of review. The court summarized the contents of the letter as making the following four factual assertions: (1) the police coerced Dinardo to (2) inculpate petitioner, (3) Dinardo did not know petitioner; and (4) Dinardo and petitioner did not commit any crime. (Cert. Pet., App. at 90.) The court found that trial testimony rebutted the first three statements and half of the fourth statement. Specifically, the court found that the statement Dinardo did not know petitioner was false in light of testimony from petitioner's brother and his former roommate that petitioner and Dinardo were friends. The court also observed that at least half of the fourth statement (that Dinardo and petitioner had not committed any crime) was demonstrably false given that Dinardo's fingerprint was found on or near the bar cash register. The court specified that "Dinardo's denial of involvement in the crime was thus patently false." The court concluded that the intrinsic and probative value of the letter was "low" such that petitioner's right to effective cross-examination was not substantially diminished by exclusion of the letter. The district court, thus, denied the petition. (See Cert. Pet., App. at 95.)

The Ninth Circuit again granted petitioner's request for a certificate of appealability as to one issue: "Whether the district court erred by ruling that the state trial court did not violate appellant's Sixth Amendment right to confrontation when it denied him access to Dinardo's letter." The Ninth Circuit panel held that petitioner's constitutional right of confrontation did not require disclosure of the Dinardo letter in light of its low probative value

and the otherwise effective cross-examination of Dinardo. *Murdoch* v. *Castro*, 489 F.3d 1063, 1069-70 (9th Cir. 2007) (*Murdoch II*). Accordingly, the panel affirmed the district court's denial of Murdoch's petition. *Id.* at 1070.

The Ninth Circuit ordered that the case be reheard en banc. In a 5-1-5 decision, the en banc panel affirmed the denial of habeas relief and the judgment of the district court. The five-judge plurality of the en banc court found:

> Because the Supreme Court has not clearly established whether and in what circumstances the attorney-client privilege must give way in order to protect a defendant's Sixth Amendment confrontation rights, the California state court could not have unreasonably applied clearly established Supreme Court law when it denied Murdoch access to the letter.

Murdoch v. *Castro*, 609 F.3d 983, 996 (9th Cir. 2010) (en banc) (hereinafter *Murdoch III*). One judge concurred in the decision, finding that the state court never had the opportunity to determine whether Dinardo's testimony should be stricken because petitioner failed to request that it be stricken. Therefore, the concurring judge explained, the state court could not have violated petitioner's confrontation rights. *Murdoch III*, 609 F.3d at 996 (Silverman, J., concurring).

REASONS FOR DENYING CERTIORARI

I.

BECAUSE THE CALIFORNIA COURT OF APPEAL ADJUDICATED PETITIONER'S CONFRONTATION CLAIM ON THE MERITS, THE ALLEGED CIRCUIT SPLIT ON WHETHER AN UNADJUDICATED CLAIM DESERVES DEFERENCE IS NOT PRESENTED HERE

In the first question presented in the petition, petitioner asserts that the Ninth Circuit erroneously reviewed petitioner's confrontation claim under the deferential standard of review prescribed by 28 U.S.C. § 2254(d) even though the California Court of Appeal had "overlooked" that claim. By applying § 2254(d), petitioner argues, the Ninth Circuit created a split of Circuit authority on the question whether the statutory deference standard applies to such an "overlooked" claim.

Petitioner's argument, however, is based on a false premise. Contrary to petitioner's assertion, the Ninth Circuit correctly concluded that the California Court of Appeal had in fact adjudicated petitioner's claim on the merits and had not overlooked it.

In his opening brief on direct appeal, petitioner asserted various claims under state law regarding the letter from Dinardo to his attorney. He asserted that the letter was not protected by the attorney-client privilege, that the privilege had been waived, and that the letter was admissible under state law. He also argued that, even if the letter were privileged, his right to cross-examine Dinardo took precedence over the attorney-client privilege. (Supp. App. at 80-89.) The California Court of Appeal expressly addressed in detail each of petitioner's

various claims regarding the attorney-client privilege, cited the relevant portion of the opening brief raising the confrontation aspect of that claim, and applied a state precedent that discussed how to balance the competing interests between the Confrontation Clause and the attorney-client privilege. As part of that analysis, the appellate court addressed whether "petitioner's need to discover the contents of the letter outweighed Dinardo's interest in confidentiality because the letter was 'directly exculpatory'" (Cert. Pet., App. at 117-23.) In doing so, the court relied upon *People* v. *Godlewski*, 17 Cal. App. 4th 940, 21 Cal. Rptr. 2d 796 (1993), a state court opinion that had examined a federal circuit court opinion addressing a claim identical to petitioner's and another precedent addressing a similar claim. *Id.* at 947-49.

In *Godlewski*, the defendant claimed he was entitled to use statements, overheard by another inmate, that his co-defendant had made to his lawyer. The defendant "relie[d] upon cases which have adopted a balancing approach to decide whether or not the *attorney-client privilege* should yield to the accused's *right to confront and cross-examine*." *Id.* at 947, emphasis added. *Godlewski* discussed and applied the reasoning of two cases, one from the federal courts of appeal, addressing the balance between the attorney-client privilege and a criminal defendant's federal constitutional rights, and another which directly addressed the right to cross-examine. *Id.* at 947-48.

In *United States ex rel. Blackwell* v. *Franzen*, 688 F.2d 496 (7th Cir. 1982), the *Godlewski* court observed, the Seventh Circuit reversed the district court's finding "that the limitation placed on the defense cross-examination of the accomplice violated the constitutional right to cross-examine."

Godlewski, 17 Cal. App. 4th at 947, see *Blackwell*, 688 F.2d at 500. In addition, *Godlewski* noted the Seventh Circuit's conclusion that "the invocation of the attorney-client privilege had not prejudiced the defendant's right to cross-examine the state's principal witness" in light of the "wide latitude" defense counsel had been given to "explore the issue of the accomplice's credibility[ ]" *Godlewski*, 17 Cal. App 4th at 947, see *Blackwell*, 688 F.2d at 501.

Godlewski also relied on a decision from the Court of Appeals for the District of Columbia, *Neku* v. *United States*, 620 A.2d 259 (D C. 1993), which the state court cited for the proposition that "[i]n the criminal context the [attorney-client] privilege acquires Sixth Amendment protection." *Godlewski*, 17 Cal App. 4th at 746 The *Godlewski* court explained that, in *Neku*, the defendant sought to call his former co-defendant's "former attorney to testify to prior inconsistent statements [the former co-defendant] had made to counsel which would allegedly impeach [the former co-defendant's] inculpatory trial testimony." *Godlewski*, 17 Cal. App 4th at 748 *Godlewski* noted that the Court of Appeals for the District of Columbia, relying on *Blackwell*, had upheld the trial court's finding that the statements were privileged and concluded that "the probative value of the proffered impeachment was inadequate to outweigh the interests protected by the attorney-client privilege, given the other methods available to impeach [the former co-defendant]." *Id* at 948.

The *Godlewski* court concluded that neither *Blackwell* nor *Neku* held "that the defendant has a per se right to breach the attorney-chent privilege in order to present a defense. The most that can be distilled from the two cases is that a criminal defendant *may*, under certain circumstances, have

the right to use privileged communications" *Godlewski*, 17 Cal. App. 4th at 948, italics in original. As pertinent here, the court then concluded: "To make that determination, a court must employ a balancing process to decide if a breach of the privilege is necessary to implement *the accused's constitutional rights.*" *Id.*, emphasis added.

In petitioner's state appeal, the California appellate court manifested its rejection of petitioner's confrontation/attorney-client privilege claim by relying on *Godlewski*, as follows.

> Finally, Murdoch claims that even if the letter fell within the attorney-client privilege, and if the privilege was not subsequently waived, his need to discover the contents of the letter outweighed Dinardo's interest in confidentiality because the letter was "directly exculpatory. . . .["] In his habeas petition, Murdoch asserts the letter did even more because it "substantively exculpates petitioner." We are not persuaded. "[I]t is patent that the attorney-client privilege is not one to be easily discarded merely because a defendant asserts that invocation of the privilege results in the denial of his right to a fair trial (*People v. Godlewski* (1993) 17 Cal.App.4th 940, 947.) "[W]e conclude that only the most extraordinary circumstance would justify disclosure of privileged communications between lawyer and client . . . ." (*Id.*, at p. 945.) We find no such extraordinary circumstances here.

(Cert. Pet., App. at 123.)

As the Ninth Circuit noted, although the California appellate court did not expressly refer to the Confrontation Clause, see *Murdoch III*, 609 F.3d at 991 n.6, it nonetheless addressed petitioner's constitutional claim. As the Ninth Circuit explained:

> The California Court of Appeal, which rendered the last reasoned state decision in this case, addressed Murdoch's Confrontation Clause argument only obliquely. It did not mention the Confrontation Clause in its opinion, but it did discuss and quote from the section of Murdoch's brief in which he raised the issue. The court also quoted from *People v. Godlewski*, 17 Cal.App.4th 940, 21 Cal.Rptr.2d 796, 800 (1993), a case that dealt with the tension between the attorney-client privilege and the Confrontation Clause.

Id. Thus, the Ninth Circuit correctly found that the California appellate court adjudicated petitioner's confrontation/attorney-client privilege claim on the merits. The California appellate court relied on *Godlewski*, which specifically dealt with the confrontation/attorney-client privilege issue.

Contrary to petitioner's argument, the state court did not address the state law issues only. The state court cited the section of the opinion that dealt with that federal issue. (Cert. Pet., App. at 123, citing *Godlewski*, 17 Cal. App. 4th at 940, 945, 947.) Indeed, the court's citation to *Godlewski* only makes sense as it relates to petitioner's confrontation claim. In addition, the court referred to and quoted the section of petitioner's brief raising the confrontation/attorney-client privilege claim. These facts demonstrate the court did not "overlook[]" the confrontation claim. On the contrary, they establish

that the court considered and denied petitioner's claim that his right to cross-examine Dinardo outweighed Dinardo's attorney-client privilege.

Moreover, petitioner reasserted the same confrontation/attorney-client privilege claim in a separate habeas petition that the California appellate court also denied on the merits in its opinion. (Cert. Pet., App. at 98, 134.) So the state court not only denied petitioner's federal confrontation claim in the appeal, but also adjudicated the merits of the claim when it denied the corresponding habeas petition. See *Harrington* v. *Richter*, 131 S Ct. 770, 784 (2011).

As a result, the Ninth Circuit correctly held:

> Here, AEDPA applies because the state court denied Murdoch's claim "on the merits," rather than on a procedural or other ground. 28 U.S.C. § 2254(d)(1); *see Lambert v. Blodgett*, 393 F 3d 943, 969 (9th Cir 2004); *Reynoso v. Giurbino*, 462 F.3d 1099, 1109 (9th Cir. 2006) (assuming, unless it is otherwise "clear," that a state court has decided all the issues presented); *Hunter v. Aispuro*, 982 F.2d 344, 346-48 (9th Cir 1992) (presuming denial of habeas relief is on the merits, not procedural grounds, unless the decision supports the opposite conclusion).

Murdoch III, 609 F.3d at 989

As the foregoing quotation makes clear, the Ninth Circuit concluded that the California appellate court had adjudicated petitioner's claim on the merits. The Ninth Circuit did not, as petitioner asserts, "[find] it irrelevant whether the California courts overlooked Murdoch's arguments." (Cert Pet at 12.) Nor did the California appellate court

overlook what petitioner implies was the last claim on appeal. (Cert. Pet. at 11-12 ("This Confrontation claim was Murdoch's eleventh enumerated argument, but the Court of Appeal addressed *only* the first ten arguments") (emphasis added).) Rather, petitioner raised twenty-two enumerated arguments in his opening brief, and the state court proceeded to address the remaining arguments in its opinion. (Cert. Pet., App. at 123-33.)

Given that the state court did not "overlook[]" petitioner's claim but instead considered and denied it, the fact that the court did not expressly cite the Confrontation Clause in its opinion is irrelevant. As the Ninth Circuit explained:

> Whether the state court adequately responded to Murdoch's Confrontation Clause argument, however, is irrelevant. Even when there is no reasoned state court opinion explaining the denial of a defendant's claim in any respect, we "must assume that the state court has decided all the issues and 'perform an independent review of the record to ascertain whether the state court decision was objectively reasonable.'" *Reynoso* [v. *Giurbino*], 462 F.3d [1099,] 1109 [9th Cir. 2006] (quoting *Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir. 2005) (per curiam)) (internal quotation marks omitted). Thus we do not review Murdoch's claim de novo, as we would if the state court had clearly indicated that it had not reached the merits of Murdoch's claim. *See id.*; *Pirtle* [v. *Morgan*], 313 F.3d [1160,] 1167 [9th Cir. 2002].

Murdoch III, 609 F 3d at 991 n.6.

As this Court recently explained in another context,

> By its terms § 2254(d) bars relitigation of any claim "adjudicated on the merits" in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2). *There is no text in the statute requiring a statement of reasons.* The statute refers only to a "decision," which resulted from an "adjudication." As every Court of Appeals to consider the issue has recognized, determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning. [Citations omitted.] And as this Court has observed, a state court need not cite or even be aware of our cases under § 2254(d). *Early v. Packer*, 537 U.S. 3, 8 (2002) *(per curiam)*. Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief

Richter, 131 S. Ct. at 784 (italics added).

Contrary to petitioner's assertion, the Ninth Circuit plurality did not hold that an overlooked claim warrants deference under § 2254(d). Rather, the court held that the California Court of Appeal had in fact adjudicated the claim on the merits. As a result, the claim was plainly entitled to deference under Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). It follows that petitioner's assertion, that the Ninth Circuit erroneously applied § 2254(d) to an "overlooked" claim so as to create a circuit split is incorrect.

II.

BECAUSE THE CONFRONTATION CLAUSE DOES NOT EXTEND TO DISCOVERY, THE CALIFORNIA COURT OF APPEAL COULD NOT HAVE CONTRADICTED OR UNREASONABLY APPLIED ANY CLEARLY ESTABLISHED AUTHORITY OF THIS COURT

Nor is certiorari warranted on the second question presented in the petition. Petitioner asserts that certiorari should be granted to correct the Ninth Circuit and because petitioner is entitled to habeas relief. However, in making this argument, petitioner does not allege a split among the circuit courts of appeal or identify an issue of national importance. Rather, petitioner simply argues that the Ninth Circuit's decision was incorrect. Certiorari is not warranted on that basis. Moreover, since the trial court did not restrict Dinardo's cross-examination, petitioner's claim is necessarily based on an extension of the Confrontation Clause to discovery, but this Court has expressly held the precise opposite. Further, even assuming that the trial court's discovery ruling could be viewed as an implicit restriction on Dinardo's cross-examination, as the Ninth Circuit recognized, the state court decision did not result in a ruling that was contrary to, or involved an unreasonable application of, this Court's clearly-established Confrontation Clause law. For these reasons, certiorari is not warranted.

A. The Trial Court Did Not Restrict Petitioner's Cross-Examination of Dinardo; Accordingly, The California Court of Appeal's Decision Is Entirely Consistent With This Court's Precedent

In *Pennsylvania* v. *Ritchie*, 480 U.S. 39 (1987), the defendant claimed that he could not effectively cross-examine his daughter, whom he was accused of molesting, because he did not know which types of questions would best expose the weaknesses in her testimony without investigatory material prepared by a state child services agency. 480 U.S. at 51. This Court rejected a broad interpretation of *Davis* v. *Alaska*, 415 U.S. 308 (1974) and found, "The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. [Footnote.]" *Pennsylvania* v. *Ritchie*, 480 U.S. at 52-53. This Court concluded that "the Confrontation Clause was not violated by the withholding of the CYS file; it only would have been impermissible for the judge to have prevented Ritchie's lawyer from cross-examining the daughter. Because defense counsel was able to cross-examine all of the trial witnesses fully, . . . the Pennsylvania Supreme Court erred in holding that the failure to disclose the CYS file violated the Confrontation Clause." *Id.* at 54.

Similarly, here, petitioner sought discovery of Dinardo's letter to cross-examine Dinardo about the letter. Since the Confrontation Clause did not extend to the CYS file in *Ritchie*, it does not extend to Dinardo's letter here because the Confrontation Clause does not extend to discovery and does not require the disclosure of records in order to facilitate cross-examination. Accordingly, *Ritchie* compels the

conclusion that the California Court of Appeal's rejection of petitioner's claim did not contradict or involve an unreasonable application of this Court's precedent. On the contrary, it was consistent with *Ritchie*.

In an attempt to avoid the obvious consequences of *Ritchie*, petitioner claims that "[petitioner's] objection involves a 'court imposed restriction on the scope of questioning[.]'" (Cert. Pet. at 22.) However, petitioner does not and cannot point to any such restriction. While the trial court ruled that Dinardo's letter was protected by the attorney-client privilege, petitioner's counsel never attempted to obtain a ruling from the trial court about the permissible scope of cross-examination, including Dinardo's conversation with the prosecutor about the letter. In addition, petitioner's counsel never attempted to ask Dinardo any questions about Dinardo's conversation with the prosecutor about the letter, or about the letter itself, during cross-examination. He did, however, successfully cross-examine Dinardo about his testimony at his own trial that the police coerced his confession, which covered the important aspect of the letter, i.e., that the police coerced Dinardo (Supp. App. at 53.) He could also have specifically asked Dinardo whether the police coerced him into identifying petitioner, an allegation specifically mentioned by the prosecutor before Dinardo's testified (Cert. Pet. at 22), but he simply did not do so. *See Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("'[T]he protection of the [attorney-client] privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing'") (citation omitted).

There was no objection or limitation on cross-examination about whether Dinardo previously claimed his confession and identification of petitioner was coerced by the police. Indeed, as noted, Dinardo testified his confession was coerced at his own trial, and counsel cross-examined him about that testimony. (Supp App. at 53.)

As in *Ritchie*, except for routine evidentiary rulings, "the trial court placed no limitation on the scope of cross-examination." *Ritchie*, 480 U.S. at 45. Accordingly, petitioner's right to confrontation was not even implicated by the trial court's ruling that Dinardo's letter was protected by the attorney-client privilege.

Citing the portion of this Court's decision in *Ritchie* addressing the prosecution's duty under *Brady* v. *Maryland*, 373 U.S. 83 (1963), petitioner argues that "[t]he Superior Court wrongly prevented [petitioner], once he knew of the letter, from using it to cross-examine Dinardo." (Cert. Pet. at 22.) Petitioner's argument is misplaced. There was no *Brady* claim before the Ninth Circuit, petitioner did not even allege a *Brady* claim in his federal petition in the district court, and he did not exhaust a *Brady* claim in the California Supreme Court. Moreover, the portion of the *Ritchie* decision addressing a related *Brady* issue is irrelevant to the confrontation issue here.

Petitioner's claim necessarily requires an extension of this Court's Confrontation Clause jurisprudence to discovery of records in order to facilitate additional cross-examination. Such an extension is prohibited by *Teague* v. *Lane*, 489 U.S. 288 (1989).

Petitioner's right to cross-examine Dinardo about his allegation that the police coerced him into identifying petitioner and confessing was not even

implicated, let alone restricted or violated, by the trial court's ruling that Dinardo's letter was protected by the attorney-client privilege. Accordingly, *Ritchie* compels the conclusion that the California Court of Appeal's rejection of petitioner's claim did not contradict or involve an unreasonable application of this Court's precedent. On the contrary, it was consistent with *Ritchie*.

Accordingly, certiorari is not warranted on the second question presented.

B. Even If Petitioner's Confrontation Rights Were Implicated, This Court Has Not Squarely Addressed The Relationship Between A Criminal Defendant's Rights To Cross-Examine And The Attorney-Client Privilege; Thus, The State Court Could Not Have Unreasonably Applied This Court's Precedent

Petitioner asserts that habeas relief is warranted under de novo review, but that, even under § 2254(d), the state court contradicted and unreasonably applied this Court's clearly established precedent. (Cert. Pet. at 16-20.) According to petitioner, as of the time of the California appellate court's decision in 1998, this Court had clearly established a rule that "a trial court cannot bar inquiry into relevant subjects of impeachment of an accuser, except to protect . . . the privilege of self-incrimination." (*Id.* at 16.)

However, this Court has not clearly established such a blanket rule. Thus, as demonstrated below, the Ninth Circuit correctly concluded that the California appellate court's decision could not have contravened or unreasonably applied this Court's clearly established precedent.

Petitioner does not argue that this Court has addressed the relationship between the Confrontation Clause and the attorney-client privilege. That state of affairs alone is enough to dispose of petitioner's claim under § 2254(d).

Petitioner instead asserts that this Court's decisions in *Smith* v. *Illinois*, 390 U.S. 129 (1968), and *Davis* v *Alaska*, 415 U.S. 308, somehow represent the clearly established law for purposes of this case. (Cert. Pet. at 17-19.) Yet, neither one of those cases deals with the potential conflict between the Confrontation Clause and attorney-client privilege, and petitioner does not claim otherwise. So they cannot serve as the clearly established law that supports any relief in this case. *Carey* v *Musladin*, 549 U.S. 70, 77 (2006).

In *Smith*, this Court directly reviewed a state criminal case in which the defense was denied an opportunity to ask a witness his real name and address, even though he admitted the name he had provided was false *Smith*, 390 U.S. at 131. This Court found that denying the defendant the opportunity to identify the witness and place the witness "in his proper setting" violated the defendant's confrontation rights. *Id.* at 132-33. This Court observed that the trial court was not obligated to "protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked." *Id.* at 133. But, since there was "no claim of the privilege of compulsory self-incrimination [] asserted" in *Smith*, *id.* at 751 n.8, the Court's language does not clearly establish the rule that applies to petitioner's claim.

Smith did not address a situation in which the right to cross-examination conflicted with any other right or legal privilege. Rather, as Justice White

noted in his concurrence, "the State gave no reasons justifying the refusal to answer a quite usual and proper question." *Smith*, 390 U.S. at 134. Thus, the *Smith* Court did not balance the right to cross-examination against any other constitutional right or legal privilege—let alone the attorney-client privilege in particular. Nor did the Court even announce a more general rule, framework, or test to apply when one constitutional right competes with another constitutional right or legal privilege. Accordingly, *Smith* did not compel the California appellate court to resolve petitioner's claim differently. As a result, the California appellate court could not have contradicted or unreasonably applied *Smith*, as petitioner suggests. (Cert. Pet. at 18-19.)

In *Davis*, this Court addressed the "tension between the right of confrontation and the State's policy" (415 U.S. at 314) of "preserving the confidentiality of juvenile adjudications of delinquency" (*id.* at 309). The Court found that, although "counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial." *Id.* at 318. The Court noted that, given "the limited cross-examination that was permitted," the jury may have believed that defense counsel's questions were speculative or a "baseless line of attack on an innocent witness[.]" *Id.* at 318. The Court held: "*On these facts* it seems clear to us that to make such an inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination[.]" *Id.*,

emphasis added. Later, the Court reiterated: "*In this setting* we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender." *Id.* at 319, emphasis added. The Court also balanced the competing interests between the right of confrontation and the State's policy:

> Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is *outweighed* by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

Id. at 319.

Davis did not hold that the right of confrontation always prevails over all state-created rights or privileges. In certain cases, the protected information could be entirely cumulative or even less useful than other readily-available impeachment material. By specifically concluding that its holding was based on the particular facts at issue and on balancing the right of confrontation with the State's policy, *Davis* left room for the possibility that another right or privilege may in certain circumstances take precedence over a certain line of questioning during cross-examination. Indeed, as Justice Stewart observed in his concurring opinion, "the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions." *Davis*, 415 U.S. at 321.

Davis did not clearly establish that the right of confrontation always trumps other rights or

privileges; it instead employed a balancing test between the right of confrontation and a "State policy." It necessarily follows that *Davis* did not clearly establish the rule suggested by petitioner that the right of confrontation always takes precedent over other rights and privileges, except for the ones enumerated in *Smith* (Cert. Pet. at 17-19.) As a result, the California appellate court could not have contradicted or unreasonably applied such a rule in denying petitioner's claim

The Ninth Circuit correctly found that *Swidler & Berlin* v *United States*, 524 U.S. 399 (1998), supported the conclusion that there was no clearly established Supreme Court law on the issue presented in petitioner's habeas petition. In *Swidler*, this Court addressed "'the extent to which the [attorney-client] privilege survives the death of the client.'" *Murdoch III*, 609 F.3d at 993, quoting *Swidler*, 524 U.S. at 403. The issue in *Swidler* was whether the attorney-client privilege should give way to a criminal investigation after the client's death Although *Swidler* was procedurally and factually different from the case here, the Ninth Circuit found the following statement in *Swidler* "significant[]":

> "Petitioners, while opposing wholesale abrogation of the privilege in criminal cases, concede that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege," but the Court stated that "*[w]e do not need to reach this issue*, since such exceptional circumstances clearly are not presented here."

Murdoch III, 609 F.3d at 994, quoting *Swidler*, 524 U.S. at 408 n.3.

The Ninth Circuit then concluded that *Swidler* itself foreclosed habeas relief in this case:

> *The Supreme Court accordingly has explicitly stated that it was not deciding whether the attorney-client privilege might have to yield to a criminal defendant's constitutional rights.* We have held that a constitutional principle is not clearly established for purposes of § 2254 where the Supreme Court has expressly concluded that an issue is an "open question."

Murdoch III, 609 F 3d at 993-94, emphasis added and citations omitted.

Similarly, the Eighth Circuit Court of Appeals has concluded that this Court has "expressly left open the question of whether a criminal defendant's constitutional rights might overcome the attorney-client privilege." *Newton* v. *Kemna*, 354 F.3d 776, 781 (8th Cir. 2004); see *Murdoch III*, 609 F 3d at 994. The Eighth Circuit reasoned:

> Whether a constitutional right might prevail over a privilege seems to be a function of the relative strength of the privilege and the nature of the constitutional right at stake, and we are unable to discern any transcendental governing principles that foreshadow what the Supreme Court would do in the case before us Given the restrictive nature of habeas review, it is not our province to speculate as to whether the Supreme Court, if faced with the issue, would find that Missouri's physician-patient privilege must give way to a defendant's desire to use psychiatric records in cross-examination

Newton, 354 F 3d at 782.

As the Ninth Circuit explained, "[t]he attorney-client privilege is, after all, 'one of the oldest recognized privileges for confidential communications,'" *Murdoch III*, 609 F 3d at 995, quoting *Swidler*, 524 U.S at 403 As a result, this Court "might well decide that [the attorney-client] privilege is worthy of greater protection than the marital privilege . . . or the confidentiality of juvenile delinquency proceedings . . . ." *Murdoch III*, 609 F.3d at 995. What matters under § 2254(d) is that at the time of the California appellate court's decision in 1998, it had not done so.

This Court has repeatedly cautioned that, when its cases "give no clear answer to the question presented, let alone one in [petitioner's] favor, it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law." *Wright* v. *Van Patten*, 552 U.S. 120, 126 (2008); *Schriro* v *Landrigan*, 550 U.S. 465, 478 (2007); *Carey* v. *Musladin*, 549 U.S. at 77; *Kane* v. *Garcia Espitia*, 546 U S. 9, 10-11 (2005) (per curiam). Since this Court's cases "give no clear answer to the question presented in this case, let alone one in [petitioner's favor], it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law *Musladin*, 549 U.S. at 77, 127 S Ct. 649, 654 (quoting 28 U.S.C § 2254(d)(1))" *Van Patten*, 552 U.S at 126 (internal quotations omitted). "Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized" *Id.*

Certiorari is unwarranted because, even assuming the Confrontation Clause is implicated, this AEDPA case involves an issue of first impression, specifically, the relationship between the Confrontation Clause and the attorney-client

privilege. For this additional reason, the petition for writ of certiorari should be denied

C. Even Assuming *Smith* And *Davis* Constitute Clearly Established Federal Law Governing Petitioner's Claim, Relief Is Barred By § 2254(d)

Even assuming that *Smith* and *Davis* constitute clearly established precedents from this Court governing petitioner's claim, § 2254 (d) bars habeas relief. Since the Ninth Circuit concluded that the absence of clearly established law precluded relief under § 2254(d)(1), the court had no occasion to determine whether the California Court of Appeal contradicted or unreasonably applied *Smith* or *Davis* However, even if those cases govern petitioner's claim, habeas relief is unavailable because the state appellate court did not contradict or unreasonably apply those cases in denying petitioner's claim. Indeed, the state court's decision was entirely consistent with those cases.

It is well-settled that a defendant's right to cross-examination under the Confrontation Clause "is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers* v *Mississippi*, 410 U.S 284 (1973) Generally, the right to cross-examination is satisfied if defense counsel receives wide latitude to question witnesses at trial. *Delaware* v. *Fensterer*, 474 U.S 15, 20 (1985) (per curiam). Notably, the right of confrontation guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.*

"The attorney-client privilege is the oldest of privileges for confidential communications known to the common law." *Unjohn Co.* v. *United States*, 449 U.S. 383, 389; *Swidler*, 524 U S at 410 (same). When this Court addressed a conflict between the right of confrontation and a state-created protection for juvenile offender information in *Davis*, the Court did not hold in absolute terms that the right of confrontation automatically trumps state-created interests regardless of the circumstances. Rather, this Court employed a balancing test *Davis*, 415 U S. at 319-400 (holding that on those facts, "the State's policy of protecting a juvenile offender . . . is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial witness").

Circuit courts of appeal have also applied a balancing test. In *Blackwell*, the Seventh Circuit held that a court "must ultimately decide whether the probative value of the alleged privileged communication was such that the defendant's right to effective cross-examination was substantially diminished." *Blackwell;* 688 F.3d at 501. The court upheld the trial court's limitation on cross-examination given that "the state trial and appellate courts balanced the interests served by the attorney-client privilege against what they determined to be the probative value of the offered testimony[.]" *Id.* Accordingly, the court was "particularly reluctant, in view of principles of federalism, to interfere and substitute [its] own judgment." *Id.* The court also distinguished *Davis*, noting that the trial court had not "blindly adhere[d] to the assertion of the privilege" *Id.*; see *United States* v. *Ranoine*, 32 F.3d 1203, (7th Cir. 1994) (the attorney-client privilege "might have to yield in a particular case if the right of confrontation . . . would be violated by its

enforcement" but concluding that "[a] trial judge does not violate the Constitution when he limits the scope of cross-examination for a good reason, and here as in the usual case desire to protect the attorney client privilege was a good reason"); *Jenkins* v. *Wainwright*, 763 F.2d 1390, 1392-93 (11th Cir 1985) (concluding that the trial court's limitation on cross-examination regarding matters protected by the attorney-client privilege "did not offend the Sixth Amendment" given that the trial judge permitted a wide latitude of questioning, "defense counsel conducted an extensive and pointed interrogation of" the witnesses, and "the cross-examination was more than adequate to expose the witnesses' bias and self-interest").

Similarly, here, the California appellate court, applying *Godlewski*, found that petitioner's interest in the letter was not outweighed by the attorney-client privilege. (Cert. Pet., App. at 123.) A fairminded jurist could reach this same conclusion after considering the probative value of the privileged information, the wide latitude counsel received in cross-examining Dinardo, the pointed and thorough cross-examination conducted by trial counsel, and the admissions counsel elicited during cross-examination, including Dinardo's motivations for testifying in this case.

The probative value of the letter was nominal because a vast majority of the letter was demonstrably false. As the district court correctly found, although an isolated excerpt from the letter would have benefitted petitioner, "other factual statements in the letter were either contradicted by trial testimony . . . or were demonstratively false in the light of other trial testimony[.]" (Cert. Pet., App. at 91). Since much of the letter was demonstrably false, "the clear falsehoods undermine the credibility of every other statement in the letter." (Cert. Pet.,

App. at 90.) The district court therefore concluded that, "taken as a whole, the intrinsic probative value of the letter was and is low." (*Id.*)

As the district court further explained, "the impeachment value of the letter would have been markedly attenuated because of the nature of the facts Dinardo asserted in the letter." (Cert. Pet., App. at 92.) Thus, "petitioner's right to effective cross-examination at the trial was not substantially diminished by the trial court's exclusion of the letter from evidence." (*Id.*) Notably, this finding was made under a de novo standard of review, rather than the deferential standard mandated by AEDPA that applies here.

Furthermore, petitioner's trial counsel extensively cross-examined Dinardo and thoroughly attacked his credibility. Trial counsel not only impeached Dinardo's credibility generally with, for example, prior convictions, but he also attacked his credibility through questions about any bias, prejudice or ulterior motive Dinardo might have for testifying in the manner he did in this particular case. This included an expected reduction in the charge from first-degree murder to manslaughter, an expected reduction in his sentence from 25-years-to-life to 12 years with an expectation of being released in five years, and Dinardo's desire to be reunited with his daughter. (Supp. App. at 10-11, 33-37.) Indeed, Dinardo admitted that he would have spent the rest of his life in prison had he not testified against petitioner. (Supp. App. at 10.) Trial counsel also elicited Dinardo's testimony that he had initially repeatedly denied his involvement in the robbery to the police. (Supp. App. at 17-19.)

Petitioner's trial counsel clearly exposed Dinardo's bias, prejudice or ulterior motive for testifying during cross-examination. "'[T]he exposure

of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678-79 (1986) (*quoting Davis*, 415 U.S. at 316-17, *citing Greene* v. *McElroy*, 360 U.S. 474, 496 (1959)).

In light of this testimony and the low probative value of the letter, it was entirely reasonable for the California appellate court to conclude that petitioner's right of confrontation was not violated by the restriction on cross-examination regarding the contents of Dinardo's letter. It cannot be said that no fairminded jurist could possibly disagree with that conclusion.

Moreover, any error was harmless. Petitioner mistakenly alleges that any alleged error would be reviewed under the standard set forth in *Chapman* v. *California*, 386 U.S. 18 (1967), whether the error was harmless beyond a reasonable doubt. But as this Court has held, in federal habeas cases, the question is whether the alleged error had a substantial and injurious effect or influence in determining the jury's verdict. See *Fry* v. *Pliler*, 551 U.S. 112 (2007). For the same reasons discussed above, namely, the fact that Dinardo was thoroughly impeached during cross-examination, not only generally but about his motivation for testifying in this case, that virtually the entire letter was demonstrably false, and its probative value was "low[,]" any error did not have a substantial and injurious effect or influence on the jury's verdict. Thus, habeas relief would be unavailable to petitioner.

In light of the foregoing, certiorari is unwarranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied

Dated: April 15, 2011

Respectfully submitted

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SUPPLEMENTAL APPENDIX A

FILED
APR 12 1996

EXCERPTS FROM REPORTER'S TRANSCRIPT

[RT 248] . . . .

THE COURT: Mr. Peacock, I'm sorry, but you are prepared on this case and have been preparing on this case for a long time. And I think I've been very good about giving time in this case, including yesterday breaking early and breaking early before that time. I'm denying your motion for continuance. You can decide whether you want to make an opening statement or waive it. That's your choice. I'm going forward with this trial at this time.

MS. LOCKE-NOBLE: Your Honor, before we bring the jury in, I do have one more thing to inform the court and Mr. Peacock.

I do not have anything in writing with effect to this. But I was told during the course of the interview that I had with Mr. Dinardo that there was a letter that was written by Mr. Dinardo at the request and assistance of Mr. Murdoch and that during -- in this letter it's my understanding -- I have never read the letter, I've never seen the letter, nor do I have a copy of the letter; and Mr. Fuller indicated to me this morning that he did not have [RT 249] his complete file and so he did not have a copy of the letter with him, either, and doesn't know if he ever had a copy of the letter -- but that the letter I guess in sum and substance stated that Mr. Dinardo was coerced by the police into implicating defendant Murdoch in this crime. So I want to let counsel know about that, although I have nothing in writing to show him.

THE COURT: All right.

MS. LOCKE-NOBLE: I think that goes to possible impeachment which counsel brought up.

THE COURT: Okay.

. . . .

* * *

[RT 702] Have another half day off.

Don't discuss the case, form your opinions once again.

See you tomorrow at 9:30

(At 1: 52 p. m., the jury exited the courtroom, and the following proceedings were held in open court.)

THE COURT: Just to try to avoid any possible delays, Mr. Peacock, just – I'm not taking over the discovery here. That's the People's job to do. But if there is any discovery that's under 1054, you should be giving it over, please give it over so we don't get delays.

MR. PEACOCK: I will do so, Your Honor.

THE COURT: Anything you need to say?

MS. LOCKE-NOBLE: Only other thing is on the lines of discovery, I had mentioned to Mr. Peacock about a letter. I don't know if he ever came in possession of that letter that was allegedly written by

Dino Dinardo. I indicated I never had possession of it nor have I ever seen it, but if he did come in possession of it, I think that the people would be entitled to see that.

THE COURT: Mr Peacock, anything about – do you have the letter? And what do you say about that issue?

MR. PEACOCK: I don't have the letter.

MS LOCKE-NOBLE: Then that solves it.

THE COURT: Okay, see you tomorrow at 9.30.

An adjournment was taken to Wednesday, December 20, 1995, at 9:30 a.m.)

* * *

[RT 727] MR. PEACOCK Yes.

THE COURT So you give me that piece of paper, that document, you give me that, and then you can take your recess

MS. LOCKE-NOBLE: Thank you.

(A recess was taken.)
(Proceedings were held in open court out of the presence of the jury as follows:)

MR. PEACOCK: Your Honor, before we buzz the jury out

THE COURT: Yes, Mr. Peacock

MR. PEACOCK: Your Honor, Miss Locke-Noble had made mention in the last couple of days that there was a handwritten letter or note that, apparently, Mr. Dinardo had prepared, and prior to cross-examination, I'd ask for a copy of that.

I think that Mr. Dinardo's lawyer Mr Fuller may have a copy of that. And I believe it would probably be an inconsistent statement based upon what Mr. Dinardo, I believe, is going to testify

So I think it would be an inconsistent statement.

So I would ask the court to order Mr. Fuller to produce that document.

THE COURT: Do you have a letter that has something to do with his testimony here that you expect today?

MR. FULLER. Your Honor, I have a letter in my [RT 728] possession that may very well constitute an inconsistent statement.

The conditions under which it was produced, though, as I have advised Mr Peacock, are such that I do not believe that it is a truthful restatement of what occurred

THE COURT: What is your position regarding either turning it over to both counsel or to the court or both?

MR. FULLER: I am of the view, Your Honor, that it is part of my work-product, that I am not a

party to this proceeding in a direct manner, and that it is not my responsibility to deliver that to either side of this case.

But if the court orders me to do otherwise, I will do so.

THE COURT: I'm going to order you at this time to turn it over to me, and I will then tell you and other counsel whatever I feel I can turn over to them.

MR. FULLER: Your Honor, it is presently, I believe, I'm not certain I have a copy of it. I know I have seen it previously.

I do not know for sure that I have a copy of it.

It would be in my file which is in my office two blocks away. I did not bring my whole file with me

THE COURT: At the, either the break for lunch or if there is another break, could you do that for us?

I know you are only a few blocks away.

MR. FULLER: Certainly.

* * *

[RT 750] Even though you say you might prefer to do that first rather than last, that you have cross-examination that's likely to last half hour, hour, two hours?

MR PEACOCK. I can't say that.

THE COURT: I'm going to rule then that the trial should go forward. It's 11:30. That you have the information orally, you may or not get additional information

I think you will get additional information with specificity because the reporter is willing to do that.

The discovery supposedly was supposed to be complete.

I understand how all attorneys can say, well, new things came up or I didn't think of something, but I'm not going to recess from now till 1:30 because I think, in fairness, there is plenty to talk about, and the reason of starting with one thing rather than another, I do not believe, is error, and I'm going to order the trial go further.

MR. PEACOCK: Your Honor, also, with respect to Mr Fuller, I think he is present. Maybe the court can look at that information before we start up with cross so that I know if there's something that I may ask.

THE COURT. Yes.

I said I was going to do that.

Mr. Fuller, may I look at that, please?

MR. FULLER: Yes, Your Honor.

[RT 751] I have a two and three quarter page handwritten document that was delivered to the attorney prior to me, Mr. Star.

For the record, to be complete, I also note that the address on the envelope was also to Nelda Barrett who was at the time, I believe, Mr. Murdock's counsel

I will nevertheless indicate that I believe that that document falls, not only within the area of work-product, but also in the area of privileged client communication

And therefore, would ask the court not order that it be turned over to anybody.

THE COURT: Are you asserting as Mr. Dinardo's attorney the attorney-client privilege?

MR. FULLER: Yes, I am, Your Honor.

THE COURT: On his behalf?

I need to do some research on this issue of attorney-client privilege before I make a final ruling.

I will turn this over if I feel I should at the earlier possible time after I do the research, which will probably have to be during the lunch hour.

You may call the jury in.

(Proceedings were resumed in open court in the presence of the jury as follows:)

THE COURT: Once again, all jurors are present in the courtroom, alternate as well.

Counsel present Witness on the witness stand.

[RT 752] Mr. Fuller is representing the witness.

Mr Peacock, you may commence cross-examination.

MR PEACOCK: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. PEACOCK:

Q Mr Dinardo, you are currently a convicted murderer; correct?

A Yes

Q And you were convicted of murder based upon the charges, the same that Mr Murdock is facing, correct?

A Yes.

Q And you went to a jury trial just like this with jurors seated in the box just like this, correct?

A Yes.

Q And in front of this judge, correct?

A Yes.

Q And that jury came back with a guilty verdict of a first-degree murder against you; is that right?

A Yes.

Q And you were sentenced about two months ago for a first-degree murder, and you were sentenced to 25 years to life in prison; isn't that right?

A Yes.

Q And what is your understanding of how long in custody you would do on a 25-year-to-life sentence?

A I was told I would be eligible for parole in 18 [RT 753] years, and then I would probably be denied parole, and then I would have to go back in another three years

So maybe after 21 years, I'd be eligible for parole.

Q And it's also your understanding that there was no guarantee that you would get out in 21 years, right?

A Yes

Q That you could stay in prison for the rest of your life, correct?

A Yes.

Q How old are you now, sir?

A I'm 35.

Q So you would stay in prison until you died.

A Pretty much

Q And by you coming in here and testifying today and saying that Charles Murdock was one of the people in the bar with you, you'll get out in about five years, won't you?

A That's what I've been told.

Q Your understanding is that your 25-year-to-life sentence and your first-degree murder conviction will be recalled and you will be allowed to plead to a manslaughter instead of murder, correct?

A Yes

Q And as part of that, you would be sentenced to twelve years, right?

A Yes.

Q And that twelve-year term would be reduced by the time that you been in custody already, correct?

[RT 754] A Yes.

Q And would also be reduced by half good time/work time credits, correct?

A Yes.

Q Which means you would be out in five years.

A Approximately.

Q And if you do not come into court and say that Mr Murdock was one of the people in the bar with you, you'll stay in prison on the 25-year-to-life sentence?

A Could you repeat that, please.

Q If you do not come into court and say that Mr Murdock was one of the people with you in the bar, you'll stay in prison at the 25-year-to-life sentence, correct?

A No.

I was told if I say a truthful testimony.

Q If you say truthful testimony, then you'll get out.

A I'll get the deal they offered me.

Q If you come into court and you say Mr. Murdock was not with you in the bar that night, you'll stay in on the 25-year-to-life sentence, won't you?

MS. LOCKE-NOBLE: Objection, Your Honor.

That misstates the testimony

THE COURT. That's not the way he said it.

Sustained.

Q BY MR. PEACOCK: Mr. Dinardo, you were part of the case with Mr. Murdock for approximately nine months [RT 755] before your trial in this case, right?

A Yes.

Q And you would come to and from court with Mr Murdock, correct?

A Yes.

Q And you would see Mr. Murdock in the lockup here, right?

A Yes.

Q Now let me go back.

After you were actually convicted and sentenced, you went to state prison, didn't you?

A Yes.

Q And you actually went to a particular state prison up north, correct?

A Yes.

Q And what prison was that?

A I was Wasco State Prison.

Q And you were classified as a state prisoner at that point, correct?

A Yes

Q And in fact, as you sit here today, you are a state prisoner, right?

A Yes

Q The suit that you are wearing here in court is not what they issue state prisoners, is it?

A No.

Q What you would wear in state prison is a jumpsuit, correct?

[RT 756] A Yes.

Q And you are not wearing that jumpsuit today.

You are wearing the suit for what reason?

A To testify here.

Q Convince the jury that you are telling the truth by looking more credible?

MS. LOCKE-NOBLE: Objection, Your Honor.

That is an inappropriate question.

THE COURT: That's argumentative.

That's sustained.

Q BY MR. PEACOCK: You are wearing the suit today because you want the jury to believe you, right?

MS. LOCKE-NOBLE. Objection, Your Honor.

Argumentative.

THE COURT: If you have an answer for that, you may.

THE WITNESS Well, it looks better than an orange jumpsuit.

Q BY MR. PEACOCK: Now when you got to state prison, that's when you contacted someone to say I want to testify against Mr. Murdock, correct?

A No.

Q When was it that you told people that you wanted to testify against Mr Murdock?

MR. FULLER: Your Honor, I'm going to interpose an objection at this time.

Attorney-client privilege.

THE COURT: Let me hear the answer, please, I mean, [RT 757] the question

(The record was read.)

THE COURT: I'll overrule it.

If you have an answer for that, keeping in mind the objection.

THE WITNESS: Approximately a month before I went to the state prison.

Q BY MR. PEACOCK. And at that time, you notified your attorney, is that right?

A Yes.

Q And at that time, you indicated that you would take a locked period of time in prison for being returned for your testimony, correct?

MR. FULLER: Objection.

Attorney-client privilege.

THE COURT It depends first on who you are asking him about so far as the conversation, like with whom.

MR PEACOCK: I'm asking about him, personally, not his lawyer

THE COURT: The ruling is that you can ask about his motivation himself

Why don't you do that and see where it takes you

Q BY MR. PEACOCK: Well, you indicated to your lawyer that you would be willing to come into court if you got a locked amount of time as opposed to a life sentence; correct?

A Could you repeat that

[RT 758] Q You indicated to your lawyer that you would be willing to come into court and testify against Mr. Murdock if you got a locked period of time.

A Yes.

Q Rather than a life sentence; correct?

A Yes.

Q Your purpose for being here today and testifying that Mr. Murdock was one of the people in the bar is so you can get out of prison early; isn't that right?

A Yes.

Q You are not here because you feel some social conscience that you need to tell people that this is what happened.

You are here so you can get out of prison, right?

A That's part of the reason.

Q And when you were first arrested on this case back in 1994, you were contacted by Detective Pavek, weren't you?

A Yes.

Q And he came up to Berkeley to arrest you on a warrant that had been issued for your arrest, right?

A Yes.

Q And he told you that he was investigating a robbery that occurred at the Horseshoe Bar, right?

A Yes.

Q And a murder that occurred at the Horseshoe Bar, correct?

[RT 759] A Yes.

Q And the first thing that you said when he asked you if you recognized this bar was I don't recognize that bar, right?

A Yeah.

Q You lied and told him that you didn't know anything about that bar and that you never been in that bar, right?

A Yes.

Q And he told you that your fingerprint had been found on the cash register in that bar, right?

A Yes

Q And you lied again and said there must be some sort of mistake, I've never been inside that bar, didn't you?

A Yes.

Q He told you that that bar was robbed, and you said it can't be me because I've never been inside that bar, I didn't do a robbery, correct?

A Yes.

Q That was also a lie, wasn't it?

A Yes.

Q You said I've done a lot of things in my life but I haven't done a robbery in that bar, right?

A Yes.

THE COURT: Mr. Peacock, I need about two minutes, a very brief recess, ladies and gentlemen. I have to talk to the supervising judge for a minute.

[RT 760] Sorry for sending you back into the room, but it won't be long.

Please don't discuss the case during the brief recess

(A recess was taken.)

THE COURT: We'll continue with the trial.

(Proceedings were resumed in open court in the presence of the jury as follows:)

THE COURT. Jurors are back in court.

Counsel, defendant present.

You may continue your cross-examination.

MR. PEACOCK: Thank you, Your Honor.

Q Mr. Dinardo, when the police came up to Berkeley to talk to you, they had you in a room where they spoke to you, two officers; correct?

A Yes.

Q Detective Pavek and Detective McMann, right?

A Yes.

Q And you tried your best to convince them that you've never been inside the Horseshoe Bar, didn't you?

A Yes.

Q And you tried your best to convince them that you weren't part of any robbery in that bar, right?

A Yes

Q And you tried to convince them over a period of at least a half hour to 45 minutes that you had nothing to do with this robbery, didn't you?

A Yeah. About a half hour

[RT 761] Q At some point, the officers, during that interview, said to you we got you, your fingerprint is on this, and we know that you participated in this robbery with several other people; isn't that right?

A Yes.

Q And when they told you that they knew that you had participated in it, they showed you a photograph of Mr. Murdock, didn't they?

A Pardon me?

Q When they got you that way and said we know you participated in this, they showed you a picture of Mr. Murdock, correct?

MS. LOCKE-NOBLE: Objection, Your Honor.

I don't understand the question, "We got you."

MR PEACOCK: I'll rephrase it.

Q When they told you they didn't believe your denials, they said we've got your fingerprint on the cash register, right?

A Yes.

Q And they said we know that you participated in this robbery and we know you participated with other people, correct?

A Yes.

Q And they showed you a picture of Mr. Murdock during that interview, didn't they?

A Not at that time, no.

Q They showed you a picture of him, didn't they?

MS. LOCKE-NOBLE: Objection.

[RT 762] THE COURT: Is the question did they show him a person's picture at some time during the interview?

MR. PEACOCK: Yes

THE WITNESS: Yes.

Q BY MR PEACOCK: They showed you this picture of him, correct?

A That could have been the picture.

Q All right.

That photograph of Mr. Murdock has No. 4 on it, correct?

A Right

Q They said we know this is one of the guys you participated in the robbery with?

A No.

Q They never told you that?

A No.

Q When they showed you that picture, you talked about the other people that you were involved in this robbery with, right?

A Pardon me?

Q When they showed you that picture, they asked you about the other people that you were involved in the other robbery with, right?

A No.

Q They didn't ask you about any other people that you were with?

A No.

Q Did you ever tell them at some point during the [RT 763] interview that you were with two other people?

A Yes.

Q And you told them I don't know those guys' names, right

A Right

Q And you've never seen those guys before, right?

A No.

Q They ever show you a picture of any of those guys?

A No.

Q Ever show you any other photographs besides the ones that you are looking at in front of you?

A Yes.

Q What other photographs did they show you?

A They showed a photograph of myself and some other Mexican Americans

Q You didn't identify anybody else besides this photograph; is that right?

A No.

Q Do you know the other photographs they showed of Mexican Americans?

MS. LOCKE-NOBLE: Your Honor, I didn't get the last answer to the last question.

(The record was read.)

THE COURT: Do you have what you need?

MS. LOCKE-NOBLE: Yes

THE COURT: You may go forward.

Q BY MR. PEACOCK: Do you know the other [RT 764] photographs that you looked at of the Mexican Americans?

Would you recognize those if you saw them again?

A A couple of them, 'cause a couple of them are really distinct pictures.

Q Did you know any of those people when they showed you the photographs?

A I think I saw one of them before.

Q Before what?

A Years ago one looked vaguely familiar, like somebody I had run into.

Q Tell the police officers that?

A No.

Q Portion of this interview, the first hour and 15 minutes of the interview with these officers, was not tape recorded, was it?

A To my knowledge, no Yeah.

No, it wasn't.

Q All right.

And during that period of time when it was not tape recorded is when you were going through all the denials of you being inside that bar, right?

A Yes.

Q And also the period of time when you were shown this photograph of Mr. Murdock was also during the time when it was not recorded, right?

A Yes.

Q During the course of that interview before it [RT 765] was recorded, you had some discussion with Detective Pavek and Detective McMann about what you would get in return for giving a statement to them, didn't you?

A Could you repeat that.

Q During the period of time before this interview was recorded, you had some discussion with Detective Pavek and Detective McMann about what you would get in return for giving them a statement?

A No. No.

Q Did you ever have any discussion with them about whether or not you would get released if you gave them a statement?

A No.

Q Did you ever have any discussion that you would maybe get to be reunited with your family if you gave them a statement?

A No.

Q Did you ever have any discussion that you would maybe get to go see your family?

A Yes.

Q And as part of that, the fact that you would get to go see your family, you decided to give him a statement, right?

A No.

Q Did you have the discussion about the family and whether you would get to see them before the interview was tape recorded?

A I asked him, they told me they were going to [RT 766] take me to Long Beach, and I asked the detective if I could see my spouse and my child before I left. And they said we'll think about it. We'll see.

Q That happened before the interview was tape recorded, wasn't it?

A Before and after

Q All right.

After the tape was turned off, right?

A (Nods head up and down.)

Q Is that yes?

A Yes

Q Did that happen after you were lying and saying I wasn't involved in this robbery at all, right?

A Yes

MS. LOCKE-NOBLE: Your Honor, could I have that repeated.

(The record was read.)

Q BY MR. PEACOCK: In fact, after you gave this statement and after you indicated that Mr. Murdock was one of the guys in the bar, you got to go see your family again before you were brought to Long Beach, right?

A Yes.

Q And before your trial, you tried to get your statement suppressed by saying that you been offered this deal, right?

MR FULLER: Your Honor, I'm going to object.

Calls for a conclusion on the part of this witness.

[RT 767] MS. LOCKE NOBLE: I would also object, Your Honor.

I don't understand the question

MR. PEACOCK. I'll rephrase the question

THE COURT: Okay, rephrase it

Q BY MR PEACOCK: Mr. Dinardo, before your trial, you testified just like you are today, right?

Isn't that true

THE COURT Wait a minute.

That's too broad.

I don't know what you mean.

That covers a lot of questions.

Q BY MR. PEACOCK: Before your trial began, you testified about the details of the statement that you gave Detective Pavek, correct?

A One more time.

Q Before your trial, you testified about the details of the statement that you gave to Detective Pavek, correct?

A Yes.

Q And you testified about details about what they had offered you in return for your statement, correct?

A Yes.

Q What were the details that you testified to with respect to what you were offered for your statement?

A What I testified to?

Q Yes.

A I believe I testified to the fact that they let me see my spouse and my child.

[RT 768] Q And that was one of the reasons why you gave a statement; isn't it?

A No

Q That had no part of why you gave the statement?

A No

THE COURT: Mr. Peacock, I'm sorry, I know you got plenty more questions, but I have one thing I have to take up with counsel before lunchtime.

So we are going to break till 1:30.

I, hopefully, I don't have other calendar matters.

I know I had some, but I'll try and work them in somehow this afternoon.

Please don't discuss the case or form your opinions on the evidence yet

We'll see you at 1:30.

Have a nice lunch

(At 11.56 a.m., a recess was taken until 1:30 p m of the same day.))

(Proceedings were held in open court out of the presence of the jury as follows)

THE COURT. Jury is not here, counsel are, including Mr. Fuller, who is part of what I'm doing here, and I'm pleased that he's here.

Research I've done plus the knowledge I have about the attorney-client privilege, in my opinion and my ruling is, does in fact apply to the documents that [RT 769] Mr. Fuller turned over.

Frankly, I think if he declined to turn the documents over, he was probably within his rights.

But we have gotten this far. And so I'm making a record of it.

What I'm going to do is, because I see no exception to the attorney-client privilege, in my opinion, it's inviolate insofar as these facts are concerned, I'm going to give the documents to Mr. Fuller, but I'm going to ask and I hope it's an order that's valid, that you keep these documents in case there are any further proceedings on the documents so that you'll have them in your possession

Can you do that, Mr Fuller?

MR. FULLER: Certainly, Your Honor

THE COURT: Because they are your documents, and because of the ruling I made here in open court, so if anybody wants to challenge this at some future time, they may. That's what I'm doing in this case.

MR PEACOCK: Your Honor, I would ask that we at least keep a copy in the court file

THE COURT: I'm not keeping a copy in the court file.

That's what I'm doing intentionally. That's why I'm ordering Mr. Fuller to keep them in case there are further legal proceedings.

Everything I've done is out front.

MR. PEACOCK: Well, my problem is is that in the event that this goes up on appeal, the appellate court is [RT 770 – 800] not going to have a copy of that.

THE COURT: First you'd have to make a motion to undo what I just did, obviously, in front of this court or some other court or the D.C.A. because I feel I have done what I should do under the law.

I feel I probably didn't have the right to have those papers in the first place, and we had a lawyer who gets put in a squeeze when the judge asks for papers and that's why I'm doing what I've done.

I'm ordering him to keep those papers in case later, if your client is convicted, you or any other attorney wants to make a motion on this issue, it's all out front.

(At 12:00 noon, a recess was taken until 1:30 p.m. of the same day.)

* * *

[RT 858] Following proceedings were held in open court:)

THE COURT. Morning once again, ladies and gentlemen. I did better yesterday than I did today.

All jurors are present. Both counsel and defendant ad present

Dino Dinardo,

resumed the stand and testified further as follows:

THE COURT: Mr. Dinardo, state your name for the record once again.

THE WITNESS: Dino Dinardo. D-I-N-O. D-I-N-A-R-D-O.

(Page 859 was prepared under separate cover for appellate purposes, sealed in an envelope, and filed along with the appeal transcript.)

[RT 860-1] THE COURT: You may proceed

CROSS-EXAMINATION (CONTINUED)

BY MR. PEACOCK:

Q When we left off, we were talking about your interview with Detective Pavek and Detective Mc Mann of the Berkeley Police Department back in the middle of 1994; correct?

A I believe so.

Q Now, I think you'd testified yesterday that for about a hour and 15 minutes there was a conversation going on between you and Detective Pavek and Detective Mc Mann before the tape recording was started; correct?

A An hour and 15 before the tape recorder?

Q Correct.

A I don't -- I think it was like a half hour actually.

Q During that period of time, before the tape recorder had gone on, some of that time was spent you denying ever being in the Horseshoe Bar; correct?

A Yes.

Q And denying the fact that you had committed a robbery of that bar; correct?

A Yes.

Q And at some point you'd indicated to Detective Pavek and Detective Mc Mann that you were concerned about your daughter being left at the house [RT 860-2] without you there; correct?

A Yes.

Q And you had conveyed that to Detective Pavek and Detective Mc Mann that you were troubled by your daughter being left home alone; correct?

A Yes

Q And during that same period of time that the tape recording was not on is when they showed you a picture of Mr. Murdoch; correct?

A Pardon me?

Q During that same period of time when the tape recorder was not on, that's when they showed you a picture of Mr. Murdoch, correct?

A It was after the interview.

Q All right. They show you a picture of Mr. Murdoch prior to the tape recording being brought on?

A No.

Q Now, during that period of time when the tape recorder was not on, you felt that if you cooperated with Detective Pavek and Detective Mc Mann, if you helped them, that they would release you; isn't that right?

A I felt at the time that I would at least get to see my daughter. The more I look back at it now, I knew I was in custody and I knew it wasn't going to be easy for me to get out of custody, so all I wanted to do was cooperate.

Q You were trying to get out of custody; right?

A Yes.

[RT 860-3] Q And you would have said whatever it took to get out of custody so that you could get reunited with your daughter?

A Yes.

Q And that would include pointing out someone else that may, may have been involved in the crime if you thought the police wanted you to point out --

A I was trying to be helpful in any way.

Q Because you thought if you were helpful to them that you would get released from custody, isn't that right?

A Yes.

Q And, in fact, you thought that if you pointed out somebody else and helped them locate someone else that you would get released from custody, as well; correct?

A That's part of the helping out.

Q And during the period of time that you were having the conversation with these detectives, you indicated that -- let me strike that

During that same period of time that you were speaking to the detectives, this occurred while the tape recording was on off and you were talking about being reunited with your daughter; correct?

A Can you repeat that?

Q During the period of time that the tape recording was not on, that you were talking about being reunited with your daughter, right?

A Yes.

[RT 860-4] Q And during the entire time that the tape recording was on, you also felt that if you helped them that you would get out of custody; right?

A Yes.

Can I rephrase that?

THE COURT: You may explain your answer.

Q BY MR. PEACOCK: No.

THE COURT: Yes.

THE WITNESS: I felt that it would help my custody situation if I helped. It was a very confusing moment for me, and a lot of things were going through my mind. Not hearing the charges I was charged with at the time, if I had known I'd been charged for murder, I would have had my logistics all different. But I never heard the "murder" word, so I felt that I was just there in a capacity of being a thief.

Q BY MR PEACOCK: Well, at some point before you were even brought to the station, you were apprised that you were under arrest for murder, weren't you?

A I was never told I was under arrest for murder.

Q What point were you told you were under arrest for murder?

A When I got to the Long Beach Jail and I saw my pink slip, and it said "murder" on it.

Q And the conversation that you had with Detective Pavek, before you were brought down to the station, you are telling us he never told you anything about [RT 860-5] a death occurring at this robbery?

A Well, yes. He told me. He showed me pictures of a dead person, and obviously it was a murder. But I didn't know any of the California statutes of law about abating [as spoken] -- abating [as spoken] and, you know, what felon and conspiroting [as spoken], you know, about the other person. And my ignorance of the law, I felt that the capacity of my crime, since Mr. Pavek explained to me he knew I wasn't the shooter, that kind of gave me a little sigh of relief that, well, at least I thought in my mind I'm not getting arrested for murder

Q He showed you a picture of somebody that was dead, right?

A Yeah. But he also told me, "We know you're not the shooter."

Q Well, then you knew that you weren't just there for being a thief, you were there as being part of a robbery-murder; right?

A Yeah. But like I said, again, being ignorant of the law of being at the scene of the crime when a murder is committed, I didn't know that I'd be subject to murder, also.

Q Well, did you think that Detective Pavek and Detective Mc Mann had come all the way up to Berkeley just to talk to you about being a thief?

MS. LOCKE-NOBLE: Objection, argumentative.

THE COURT: I'll allow an answer if you have an answer to that.

[RT 860-6] THE WITNESS: Well, they were -- I felt they were leading up -- they had a main suspect in this case and they were trying to find out who the murderer was, and I figured, well, I didn't hear any charge of murder, so I was still in the clear on that count, but I knew I was guilty of other infractions.

Q BY MR. PEACOCK. And they told you that they had a main suspect that they were looking for during the untaped portion of the interview, right?

A No.

Q When did they tell you that?

MR FULLER: Objection, your honor, assumes a fact not in evidence.

I don't know if I have standing to make that objection.

THE COURT: Rephrase that if you want to make it, Mr Peacock.

Q BY MR. PEACOCK: Yesterday when we talked about the untaped portion of the interview, I asked you specifically if after you had lied about being involved in it they had said to you "we know you are involved in it, and we know that the other

people were involved in it." Didn't they say that to you before the taped recording?

A Well, other people, nobody specific.

Q Well, they told you they were looking for the other people, as well, weren't they?

A Yes

Q All right. And they told you that before the [RT 860-7] tape recording was even started; correct?

A Yes.

Q And your whole mind set was to try to get out of custody and if you thought by helping that you would get out of custody; right?

MS. LOCKE-NOBLE: Objection, Your Honor, compound

MR. PEACOCK: I will break it down, Your Honor.

THE COURT: Break it down.

Q BY MR. PEACOCK: You thought that by helping them and pointing the finger at somebody else that you would get out of custody; isn't that true?

A I wanted to help.

Q You thought by pointing the finger at somebody else that you would get released; isn't that true?

MS. LOCKE-NOBLE: Objection, Your Honor. asked and answered and argumentative.

THE COURT: I will allow one last time.

Did you think you were actually going to get released or not. Did you know what was going through your mind?

THE WITNESS: Not at that time I knew I wasn't going to get released, but I figured it would lessen my charges.

MR. PEACOCK: Your Honor, I'd like to refer to the transcript.

THE COURT: Sure.

MR PEACOCK: Page 21.

THE COURT: Okay.

If I can get hold of a transcript. First tell [RT 860-8] me if you have any objection –

MS . LOCKE-NOBLE: I don't know what lines.

MR. PEACOCK: It would be lines 4 through 7

THE COURT: -- Whether you have any objection to reading that as prior testimony in his own trial or leading up to his own trial

MS. LOCKE-NOBLE: May I just have a moment, Your Honor?

THE COURT: Sure

MS. LOCKE-NOBLE. I have no objection.

THE COURT: Read it as his prior testimony.

Q BY MR. PEACOCK: You recall testifying on May 22nd of this year before your trial; correct?

A Yes.

Q And you remember being asked the question:

"No charges were going to be filed against you?"

Your answer:

"I believe some type of -- no, actually, I believe that if I could just help them in their pursuit of someone that I would be released on the spot."

Do you remember testifying –

A Yeah, I said that.

Q And that's what your thought process was throughout the entire taped interview, correct?

A That was one of them. At a certain time of the interview.

[RT 860-9] Q All right. So your feeling was before the tape recording even began that if you helped them find someone involved in this crime that you would get released on the spot; correct?

A At one point in time; but as the interview went on, and I knew I wasn't going to be released

Q Well, you knew you weren't going to be released after the interview was over and the police said "We're not going to reunite you with your daughter today"; isn't that right?

MS. LOCKE NOBLE: Objection, Your Honor, unintelligible.

THE COURT: Are you asking him what time he came to that conclusion?

MR. PEACOCK: I will rephrase it

Q At the time the interview was over, you knew at that point the police had trapped you and that you weren't going to be released?

MS. LOCKE-NOBLE: Objection, argumentative.

THE COURT: That's sustained.

Q BY MR. PEACOCK Mr. Dinardo, you knew at the end of the interview you weren't going to be released?

A Yes

Q That's the first time you realized you weren't going to be released?

MS. LOCKE-NOBLE: Objection, Your Honor, vague as to what point in time. At the very end of the interview?

Q BY MR. PEACOCK: Referring to is that the very [RT 860-10] first time you weren't going to be released, only when the interview was totally over? Or was it sometime earlier?

A It was earlier I knew I wasn't going to get released.

Q What made you think you weren't going to get released?

A Well, just the way the interview was going, and I could see, I was reading the faces of the detectives that "well, now that he's talked, we have a lead, we're going to have to file formal charges." Well, if the detectives told me what I was under arrest for -- and this is truthful, I can't remember them telling me or I didn't hear it or I blocked it out of my mind But at no point did I hear I was under arrest for murder I heard the word "murder." I heard the word "robbery." I heard the word "shooter." I heard the words "stealing money." But I couldn't put all that on myself as being the murderer because in my heart I knew I wasn't the murderer The police knew I wasn't the murderer So I felt I was immune to being the murderer and thus not being charged for murder.

So that was my -- my recollection of my thought process. And when I said that in that interview -- I mean, in that hearing, that was the best of my recollection that I -- what I was thinking at the time

Q Your thinking throughout the entire untaped portion of the interview was if you helped them locate someone as being the shooter, you would get released. True?

MS. LOCKE-NOBLE: Objection, Your Honor, asked and [RT 860-11] answered.

THE COURT: I guess one more time.

Was that through the entire conversation?

MR. PEACOCK: I'm talking about the untaped portion, Your Honor

MS. LOCKE-NOBLE: There is two untaped portions, so which untaped portion are we talking about, at the beginning or at the end?

THE COURT: The first untaped portion, assuming there are two?

MR. PEACOCK: The first untaped portion.

THE COURT. The entire time until the time you learned they turned on the tape recorder, was that your thinking or not?

THE WITNESS. Your Honor, no. No I -- I was kidding myself if I thought I was going to be released at that time.

Q BY MR. PEACOCK: Now, you also thought during the period of this interview that if you told the police officers that someone was involved in this crime, other than yourself, that potentially

you would get subpoenaed to testify against that person; right?

A That's what I was thinking, yes.

Q And you told the court that when you testified earlier?

A Yes.

Q That you thought that you might be released because you could get subpoenaed and testify against [RT 860-12] somebody; correct?

A That ran across my mind, yes

Q And that happened before the tape recording was even started; right?

A Yes.

MR. PEACOCK: If I can just have a moment, please

THE COURT: Yes

Q BY MR. PEACOCK: Now, after the interview took place, you did go to get your daughter for some period of time; correct?

A Yes.

Q When did that happen?

A The next day.

Q You weren't released then, though; right?

A No

Q You were actually flown down to Long Beach and a criminal complaint was filed against you; correct?

A Yes.

Q Mr. Dinardo, you also have some other convictions besides the first degree murder conviction that we talked about yesterday; correct?

A Yes.

Q And you have a conviction for grand theft as a misdemeanor back in 1982; correct?

A Yes.

Q Before the crime you were involved in on this case; right?

A Yes.

[RT 860-13] Q And after the crime you were involved in on this case, you were convicted of a theft, a petty theft back in 1984; correct?

A Yes.

Q Now, as part of your coming to court and testifying in this case, you don't come to court wearing handcuffs or shackled up; correct?

A Pardon me?

Q You don't come to court when you testify here wearing shackles or handcuffed; right?

A No

Q You walk out the front door and you walk around the hallways that the general public uses; right?

A Yes.

Q And when you are done testifying here, you go downstairs and you get to hang around outside in front of the building and have a cigarette; right?

A Is this recently or

Q Well, yesterday you did it; right?

A Yes.

Q And you weren't handcuffed when you were outside, were you?

A No

Q And you weren't brought over from Long Beach Police Department in the tunnel where most of the custody comes from?

MS. LOCKE-NOBLE: Objection Your Honor, calls for speculation.

[RT 860-14] THE COURT: That's a statement, Mr Peacock.

Q BY MR. PEACOCK: You familiar with the tunnel underneath the building that you come over with?

A Yes.

Q When you come over here to testify, do you have to use that tunnel?

MS. LOCKE-NOBLE. Objection, Your Honor, Irrelevant.

THE COURT. I'll allow it.

THE WITNESS: No

Q BY MR. PEACOCK: In fact, when you walk back over to the courthouse, you are completely unshackled, no handcuffs, nothing on your feet; right?

A I was handcuffed up until yesterday one pass they didn't handcuff me.

Q And when we were on recess here, you get to go out in the hallway and wander, around unhandcuffed?

A Just once, yes

MR. PEACOCK: Thank you, Your Honor. I have nothing further

THE COURT: Is there redirect?

MS. LOCKE-NOBLE. Yes, Your Honor.

May I approach the witness, Your Honor?

THE COURT: Yes.

* * *

[RT 860-30] RECROSS-EXAMINATION

BY MR PEACOCK:

Q Mr. Dinardo, you told us there was a point in the transcript about midway through where you realized you weren't going to get out of jail, right?

A Yes.

Q Remember testifying before your trial in this case?

A Pardon me?

Q Do you remember testifying before your trial at the hearing in this case?

A Yes

MR PEACOCK: And for court and counsel, I'm going to refer to page 26, lines 25 to 28; page 27, lines 1 and 2

MS LOCKE-NOBLE. Which lines again?

MR. PEACOCK. 25 through 28, page 26

THE COURT: Page 27 lines?

MR. PEACOCK: 1 and 2.

MS LOCKE-NOBLE: No objection.

THE COURT You may read it.

Q BY MR PEACOCK: Mr. Dinardo, do you recall testifying and being asked this question?

"At what point did you feel you were not going to be released?"

Your answer was:

"When they told me I was going to spend the night at Berkeley Jail."

The following question was.

[RT 860-31] "Was that after the tape-recorded conversation?"

Your answer was:

"Yes"

That was your previous testimony in this case; correct?

A Yes

Q Now you are telling us that halfway through this interview you realized you weren't going to be released; right?

A Um, no, I knew I was going during that taped interview, but that just confirmed it when they said I was going to spend the night in Berkeley Jail.

Q During the taped interview you testified earlier that you thought, at least during some of the interview you thought that if you provided information about somebody else that you would get released on the spot, correct?

A I testified to that?

Q Yes.

A I -- I can't remember testifying like that. If I could see it, I could probably remember.

Q Well, for an hour and 15 minutes before this tape recorder was ever turned on, you and Detective Pavek and Mc Mann had an extensive conversation, correct?

A Yes.

Q And you had the conversations about your being released and reunited with the daughter, didn't you?

[RT 860-32] A Yes.

Q And you had conversations about that if you provided information about somebody else involved in the crime that you thought you would be released; right?

A Yes.

Q And that happened, before this tape was even turned on –

A Yes.

Q Correct?

And that was your thought process through the entire tape that this was -- the tape was going; correct?

A No.

Q You testified that halfway through you realized that you wouldn't get released; right?

A Yes.

Q Even though previously you testified that you didn't realize that until after the tape was turned off; right?

A Well, it was vague to my memory.

Q You told us that your conscience would feel better if you got up here and you testified; right?

A Yes.

Q In fact, your conscience only got better after you got sentenced to 25 years to life in prison, isn't that right?

A Pardon me?

Q Your conscience only became developed when you got sentenced to 25 years to life to prison; right?

[RT 860-33] A No.

Q You could have pled guilty to these charges before your trial, right?

MR. FULLER: Object.

MS. LOCKE-NOBLE: Objection.

THE COURT: That's sustained. You may ask another question.

Q BY MR. PEACOCK: You went to trial just like Mr. Murdoch is, in a court with a jury?

MS. LOCKE-NOBLE: Your Honor, I'm going to object. That's an inappropriate question.

THE COURT: I will allow it.

Did you go to trial to a jury? Did you?

THE WITNESS: Yes.

Q BY MR. PEACOCK: And the purpose of you testifying before your trial was to say that your confession was coerced from you; correct?

A Yes.

Q You were trying to avoid responsibility for your actions even then, weren't you?

MR FULLER: Your Honor, excuse me, but I'm going to interpose an objection unless a follow up question is allowed, and that is at whose direction these decisions were made

THE COURT: Well, yes, I don't think I'm in a position to order how the cross-examination takes -- what form it takes.

THE WITNESS: Can you repeat that?

[RT 860-34] THE COURT: Miss Velez, would you read the last question

(The question was read.)

THE WITNESS: Yes.

Q BY MR. PEACOCK You were trying to avoid responsibility for your actions when the interview first started with Detective Pavek when you lied about not being in that bar?

MS. LOCKE-NOBLE: Objection, Your Honor, Argumentative

THE COURT: That's been asked and answered several times. Sustained.

Q BY MR. PEACOCK: You have tried to avoid responsibility for your actions all through this case, haven't you?

MS. LOCKE-NOBLE: Objection, asked and answered.

THE COURT That's been covered, Mr Peacock You can go into, as you started to, the things that were just brought up. That's what recross is for.

Unfortunately, I promised another lawyer I'm going to hear a short case. Do you have a rough idea how long you are likely to be?

MR PEACOCK I would say 10 minutes.

THE COURT: We are going to have to resume.

If you are not here until 1:40, I can't make you. That's the time we are probably going to start

Don't discuss the case Don't form the opinions on the evidence yet

[RT 860-35] We will see you at no later than 1:40

(At 12:01 p m., a lunch recess was taken until 1:40 p m. of the same day)

* * *

[RT 861] Long Beach, California;
Thursday, December 21, 1995; 1:55
Department South "K"
Hon. Charles D Sheldon, Judge

Appearances:

The defendant with his counsel, Stephen Peacock, appointed counsel pursuant to Penal Code section 987.2; Corene Locke-Noble, Deputy District

Attorney of Los Angeles County representing the People of the State of California.

(Barbara Matsukane, official reporter.)

THE COURT: We are on the record on the Murdock case.

Because counsel will have to know, you need a decision regarding witnesses.

I have read the People's cases, People versus Brown, 40 Cal.3d 512, and People versus Plasencia, 168 Cal.App.3d 546.

I have my own index of cases, and over the years, I've read. A lot of cases on eyewitness experts, et cetera.

On balance, I believe I should allow an expert for the defense to testify if they are going to call one, and I rule that Miss Pezdek can testify.

(Proceedings were resumed in open court in the presence of the jury as follows:)

THE COURT: All the jurors are now here, both counsel, defendant.

Mr. Peacock, you can finish up your recross.

MR. PEACOCK: Thank you, Your Honor.

[RT 862] RECROSS EXAMINATION (RESUMED)

BY MR. PEACOCK:

Q Mr. Dinardo, you indicated that you were going to be housed in a special location within the state prison.

Do you know which prison you are going to be housed at?

A No, I don't.

Q Have you had any discussions at all with respect to what sort of conditions that housing will take place?

A No, I haven't.

Q Have you been told by anyone that you will be able to have free access in and out of the prison?

A No, I haven't

Q Have you been told that you would potentially have more family visits or something of that nature as part of your housing?

A No.

Q No?

Have you been told that you would potentially get some sort of better job or better food or anything of that nature?

A No.

Q Has it been indicated to you that you would be able to potentially be under some sort of electronic surveillance or halfway house as part of this special location where you'll be housed?

[RT 863] A No

Q And the special housing that you will be obtaining as part of your testimony, is that going to be arranged for you by Detective Pavek?

A I'm not sure.

Q Is Detective Pavek, to your knowledge, going to help arrange your housing?

A I believed it was up to the district attorney's office.

Q And is Detective Pavek somehow involved in that as well to your knowledge?

A If he's working with the district attorney, I believe so.

MR. PEACOCK: Thank you, Your Honor.

I have nothing further.

THE COURT: Anything else, Miss Locke-Noble?

MS. LOCKE-NOBLE: Yes, Your Honor.

Thank you.

FURTHER REDIRECT EXAMINATION

BY MS. LOCKE-NOBLE:

Q Do you expect to be treated differently or with more favoritism than the inmates in general population when you are placed in protective custody?

A No.

Q Did you expect to be able to come and go at will from the prison as a result of your testimony?

A No.

* * *

[RT 878] Q Did you ever see the gun?

A No

Q He just told you he had a gun?

A Yes.

Q Did he have something that would lead you to believe that he did have a gun?

A Did -- pardon me?

Q Did he have something with him that would lead you to believe that he had a gun?

A He had a bag, a little small duffle bag, well, it was kind of (indicating) a duffle bag about this big, three feet.

MS LOCKE-NOBLE: Indicating, for the record, approximately three to four feet, Your Honor

THE COURT: Roughly

MS. LOCKE-NOBLE: I have nothing further at this time, Your Honor.

THE COURT: Re-recross?

FURTHER RECROSS-EXAMINATION

BY MR. PEACOCK:

Q Mr. Dinardo, the story about seeing Mr. Murdock coming in, asking you about pulling another job, this is the first time you said this to anybody; is that right?

A No.

Q Who else have you told?

A Detective Pavek.

Q How long ago did you talk to Detective Pavek?

[RT 879] A The day I was arrested.

Q You told him at that time that Mr. Murdock asked you to pull another job the weekend after?

A Pardon me?

Q You told Detective Pavek when he interviewed you that Mr. Murdock asked you to pull another job the weekend after in 1983?

A No.

He asked me when I had seen him next, and I told him that I saw him at the park.

Q Did you ever tell –

THE COURT: Just a minute.

Had you finished your answer telling him you had seen him at the park?

THE WITNESS: Yeah, and did I want to do another job and he had a gun to do it with.

Q BY MR. PEACOCK Your testimony is that you told Detective Pavek that in -- you told him that Mr. Murdock told you he wanted to pull another job.

A Pardon me?

Q Your testimony is that you told Detective Pavek that Mr. Murdock told you that he wanted to do another job?

A Yes.

A When did you tell him that?

A The day I was arrested

Q How come that's not anywhere in your taped transcript?

MS. LOCKE-NOBLE: Objection.

[RT 880] THE COURT: That's sustained.

Q BY MR. PEACOCK: That's not in the transcript at all.

MS LOCKE-NOBLE: Objection, Your Honor.

THE COURT: That's sustained.

The tape is there for everybody to listen to. They already have.

Q BY MR. PEACOCK: Mr. Dinardo, you looked at a transcript of that tape today, didn't you?

A Yes.

MS LOCKE-NOBLE: Your Honor, may we approach?

THE WITNESS: Can I answer the question?

THE COURT: One question at a time.

You may ask another question

Q BY MR PEACOCK: You read a copy of that transcript of the tape today?

A Yes.

MS. LOCKE-NOBLE: Your Honor, there was some redactions on that tape.

Counsel is perhaps forgetting that.

THE COURT. That's true That's true. You're right.

MS. LOCKE-NOBLE: I think this is –

THE COURT: Ordered by this court.

MS LOCKE-NOBLE: And I think this is one of the areas.

THE COURT. Mr Peacock, you may ask another question, but keep that in mind.

[RT 881] Q BY MR PEACOCK: Mr. Dinardo, at no point during the taped part of the interview did you tell Detective Pavek Mr Dinardo -- Mr Murdock wanted to pull another job with you in Dominguez Park, did you?

A I said it on the tape

THE COURT: Mr. Peacock, you may be opening –

MR PEACOCK: I'm stopping at that question, Your Honor.

Q And your testimony is that you told him no way, you wanted nothing to do with that; is that right?

A Yes

Q And you're saying that you wanted nothing to do with that because you didn't want to be involved in another theft; is that right?

A Yes.

Q Well, the next year, in fact, Mr. Dinardo, you were involved in another theft, weren't you?

A Yes.

Q So you're telling everybody that you were so clean, that you couldn't be involved in another theft, is that right?

THE WITNESS. If I can –

MS. LOCKE-NOBLE: Objection –

THE COURT: You may answer.

THE WITNESS: I feel stealing a pack of cigarettes and robbing somebody at gunpoint is two different types of theft, sir.

Q BY MR. PEACOCK: You testified earlier that the [RT 882] first day that you were arrested, you felt it was the right thing to do to testify against Mr. Murdock; is that right?

A Yes.

Q How come you lied about your involvement to Detective Pavek?

A Well, that's the first natural reaction to deny everything in my position I was scared

I didn't know what kind of evidence they had on me until they showed me the fingerprint card and the pictures and they knew it was me and they had forms where they looked legitimate of CID fingerprint department that identified me as the suspect

Q So if they didn't have any of that evidence, You would have continued to lie, wouldn't you?

A Probably, yes

Q So I guess your social conscience about not being involved in any robberies didn't bother you at that point; right?

MS LOCKE-NOBLE: Objection, Your Honor. Argumentative

THE COURT: I'll allow the answer.

THE WITNESS: Well, I was soon to admit it after that because my conscience started playing on me at that moment

Q . BY MR PEACOCK: Had Detective Pavek not shown you anything, you never would have admitted anything, would you?

A Of course not.

[RT 883] MR. PEACOCK: I don't have anything further, Your Honor.

Thank you.

THE COURT: Anything else, Ms. Locke-Noble?

MR. PEACOCK: May I have just a moment, Your Honor?

THE COURT: Yes.

Let's briefly go to side bar.

I don't need the reporter.

(Proceedings were held at the bench which were not reported.)

MS. LOCKE-NOBLE: Just a moment, Your Honor.

May I approach the witness?

THE COURT: Yes, you may.

FURTHER REDIRECT EXAMINATION

BY MS. LOCKE-NOBLE:

Q First showing you a copy of the transcript which you saw earlier this morning that was marked People's No. 26 for identification.

Going through that particular transcript on page 8, at line 15, there appears to be a black marking, is that correct?

A Yes.

Q Okay.

Just above that at line 14, it indicates that you saw the defendant one time after that at Dominguez Park.

Do you see that?

[RT 884] A Yes.

Q Taking a look at another page 8, which is not blacked out at line 15, can you read just what line 15 says.

A "And he had a duffle bag with a sawed-off shotgun in it."

Q And is that what you told Detective Pavek?

A Yes.

MS. LOCKE-NOBLE: I have nothing further, Your Honor.

THE COURT: Anything?

MR. PEACOCK: No re-recross.

THE COURT: Okay.

Mr. Dinardo, you are finished with your testimony now.

I'm going to have you on call and kept in Long Beach until this trial is over, until the case goes to the jury, in any event.

So you are free to go within your custody status.

THE WITNESS: Merry Christmas.

THE COURT: Counsel?

MS. LOCKE-NOBLE: People call Detective Pavek.

THE COURT: Mr. Pavek, if you come up to be sworn, please.

* * * * * * * *

SUPPLEMENTAL APPENDIX B

FILED
APR 22 1997

2d Crim. B100877

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v

CHARLES FRANKLIN MURDOCH, JR.

Defendant and Appellant.

Appeal From The Superior Court Of
Los Angeles County
Honorable Charles D. Sheldon, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
STATEMENT Of APPEALABILITY	5
REQUEST FOR JUDICIAL NOTICE	6
STATEMENT OF FACTS	7
A The Prosecution Evidence	7
1) The Percipient Witnesses Other Than The Codefendant	7
2) The Forensic Evidence	14
3) Dinardo's Post-Arrest Statement To Police And His Trial Testimony	15
B The Defense	21
CONTENTIONS ON APPEAL	24
1 THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS THE IDENTIFICATION EVIDENCE WHICH WAS THE TAINTED FRUIT OF A PATENTLY UNLAWFUL ARREST WARRANT	24
A. The Background Facts	24

1) The Written Suppression Motion 24

2) The Suppression Hearing 28

B. The Evidence Contained In The Application Was Wholly Insufficient To Support Issuance Of The Warrant 33

1) The "WeTIP" Deficiencies 34

2) The Deficiencies Of Dinardo's Statement 36

3) The "WeTIP" Was Insufficient To Corroborate Dinardo, And Vice Versa 38

4) The Additional Information In The Warrant Application Did Not Produce The Requisite Probable Cause 41

C. The Deficiencies In The Warrant Application Were Reinforced, Not Cured, When The Trial Court Confirmed, As A Matter Of Fact, Before It Heard Appellant's Suppression Motion, That Dinardo Was Untruthful Under Oath 43

1) Dinardo's Suppression Hearing 44

2) The Lesson Of Camps For The Present Case 46

D. The Totality Of The Circumstances Establishes, As A Matter Of Law, That There Was No Probable Cause For The Issuance Of The Warrant 48

II. THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY HERE BECAUSE PAVEK EITHER KNEW OR SHOULD HAVE KNOWN THAT THE WARRANT WAS ISSUED WITHOUT PROBABLE CAUSE 49

III. SPENCE'S IDENTIFICATION OF APPELLANT WAS OBTAINED THROUGH DIRECT EXPLOITATION OF HIS ILLEGAL ARREST, THERE WAS NO EVIDENCE, LET ALONE SUBSTANTIAL EVIDENCE, THAT SUFFICIENT INFORMATION TO JUSTIFY A LAWFUL ARREST WOULD INEVITABLY HAVE BEEN DISCOVERED 57

A. The Record Is Devoid Of Any Evidence Which Would Support The Prosecution's Theory Of Inevitable Discovery 57

B. Spence's Identification Of Appellant Was Obtained By Direct Exploitation Of His Illegal Arrest 64

IV. ADMISSION OF THE TAINTED IDENTIFICATION EVIDENCE WAS OVERWHELMINGLY PREJUDICIAL, NECESSITATING NOT MERELY REVERSAL OF THE CONVICTION, BUT DISMISSAL OF THE CHARGES 67

A. Absent Spence's Identification Of Appellant, There Was Insufficient Evidence To Support The Conviction 67

B. At A Minimum, The Tainted Identification Evidence Was Prejudicial Under The Reasonable Doubt Standard 70

V. THE DINARDO ISSUES: AN OVERVIEW 71

A. Introduction 71

B. Background Facts 73

1) The Pre-Deal Offers And Negotiations 73

(a) The June 30, 1995, In Camera Hearing 74

(b) Dinardo's original Sentencing Hearing 77

(c) Appellant's Efforts To Discover The Nature Of The Negotiations with Dinardo 78

(d) The December 12, 1995 In Camera Hearing And The Court's Post-Hearing Comments 82

2) Announcement Of The Deal And Resulting Motions For Mistrial Or Continuance 86

3) The Evidence Code Section 402 Hearing 88

4) The Renewed Request For A Continuance For Purposes of Further Preparation And To Enable Appellant To File A Disqualification Motion 89

5) The Disqualification Motion 90

6) Objections To Dinardo's Testifying 91

7) Suppression Of The Dinardo Letter 91

8) Dinardo's Resentencing Hearing (The December 26, 1995, In Camera Hearing) 94

9) The Motion For New Trial 97

(a) The Issues Raised In The Written Motion 97

(b) The Additional Issue Raised At The Hearing On The Motion 98

VI. CRITICAL TO EVALUATION OF THE ISSUES RAISED BY DINARDO'S TESTIMONY IS THE FACT THAT THE TRIAL COURT LACKED JURISDICTION TO REDUCE DINARDO'S SENTENCE IN THE MANNER IT DID 100

A Penal Code Section 1170(d) Authorized Only Recall Of Dinardo's Sentence, Not Vacation Of The Underlying Conviction 100

B. The Filing Of Dinardo's Notice Of Appeal Divested The Trial Court Of Jurisdiction To Take Any Action With Respect To His Underlying Conviction 104

C. Nothing In The DeSantis Opinion Authorizes Or Validates The Trial Court's Actions Here 105

VII. BARTERING AN ILLEGAL SENTENCE FOR ACCOMPLICE TESTIMONY IS IN AND OF ITSELF A DENIAL OF DUE PROCESS 107

VIII EVEN IF AN ILLEGAL SENTENCE WERE NOT A PER SE DENIAL OF DUE PROCESS, THE PROMISE OF SUCH A SENTENCE, UNDER THE PARTICULAR FACTS OF THIS CASE, MEASURED BY THE DESANTIS STANDARDS PRODUCED AN OVERWHELMING COMPULSION FOR DINARDO TO TESTIFY FAVORABLY TO THE PROSECUTION 108

IX. THE DESANTIS STANDARDS WERE FURTHER VIOLATED HERE BECAUSE THE JURY WAS NOT ADEQUATELY INFORMED OF THE CIRCUMSTANCES SURROUNDING THE LENIENCY AGREEMENT 114

A. Essential Information Was withheld From Appellant, And The Jury In Violation Of Appellant's Due Process Rights 114

B. No Legitimate Public Policy Justified Secrecy As To The History Of The Dinardo "Deal" 118

X. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN CONCLUDING THAT THE DOTARD LETTER WAS PRIVILEGED 120

A. The Record Establishes As A Matter Of Law That The Letter Was Never Privileged 120

B. Even If The Letter Had Originally Been Privileged, Dinardo Waived The Privilege By Partial Oral Disclosure Of Its Contents To The Prosecutor 123

XI. EVEN IF DINARDO'S LETTER WERE PRIVILEGED, APPELLANT'S 5TH AND 6TH AMENDMENT RIGHTS TO A FAIR TRIAL AND TO CONFRONT AND CROSS-EXAMINE THE CHIEF WITNESS AGAINST HIM WOULD TAKE PRECEDENCE OVER DINARDO'S ATTORNEY-CLIENT PRIVILEGE UNDER THE PARTICULAR FACTS OF THIS CASE 125

A. The Governing Principles 125

B. Given The Crucial Nature Of The Evidence, Appellant's Need To Discover The Letter Far Outweighed Dinardo's Desire To Maintain Confidentiality 129

C. Dinardo's Assertion Of His Attorney-Client Privilege With Respect To The Letter Is Analogous To The Defendant's Unsuccessful Assertion Of His Miranda Rights In Harris v. New York And Should Be Resolved Similarly 133

D Suppression Of The Letter Was Prejudicial Error 135

XII. ASSUMING, ARGUENDO, THAT THE LETTER WAS ENTITLED TO PROTECTION, THE CONSTITUTIONALLY MANDATED REMEDY WAS TO EXCLUDE DINARDO'S TESTIMONY 137

XIII. APPELLANT WAS DENIED DUE PROCESS BECAUSE OF JUDICIAL BIAS THAT WAS MANIFESTED THROUGHOUT THE TRIAL 138

XIV THE ISSUE OF JUDICIAL BIAS IS PROPERLY COGNIZABLE ON THIS APPEAL 149

XV. APART FROM THE ISSUE OF JUDICIAL BIAS, DENIAL OF APPELLANT'S REQUEST FOR THE CONTINUANCE NECESSARY TO PREPARE HIS DEFENSE DEPRIVED HIM OF THE EFFECTIVE ASSISTANCE OF COUNSEL 152

XVI. JUDGE SHELDON SHOULD HAVE RECUSED HIMSELF FROM HEARING THE MOTION FOR NEW TRIAL BECAUSE IT WAS PREDICATED ON THE JUDGE'S OWN BIAS 157

XVII. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE SPECIAL CIRCUMSTANCES FINDINGS 157

XVIII. THE TRIAL COURT APPLIED AN ERRONEOUS STANDARD IN DENYING THE MOTION FOR NEW TRIAL ON THE SPECIAL CIRCUMSTANCE ISSUE 160

XIX. IT WAS PREJUDICIAL ERROR TO ADMIT DINARDO'S TESTIMONY REGARDING APPELLANT'S SOLICITATION TO COMMIT ADDITIONAL UNCHARGED CRIMES 162

XX. IT WAS PREJUDICIAL ERROR FOR THE COURT TO INSTRUCT ON CHANGE APPEARANCE AS EVIDENCE OF CONSCIOUSNESS OF GUILT 163

XXI. PROSECUTION OF APPELLANT FOR ATTEMPTED MURDER (Count 2) CONSTITUTED AN EX POST FACTO APPLICATION OF THE STATUTE OF LIMITATIONS 168

A. The Statute Of Limitations Bar May Be Raised For The First Time On Appeal 168

B. Appellant Could Not Constitutionally Be Prosecuted For Attempted Murder 170

XXII AT A MINIMUM, THE SENTENCE ON COUNT 2 MUST BE VACATED AND A NEW SENTENCING HEARING HELD 173

CONCLUSION 174

[AOB 125]

XI.

EVEN IF DINARDO'S LETTER WERE PRIVILEGED, APPELLANT'S 5TH & 6TH AMENDMENT RIGHTS TO A FAIR TRIAL AND TO CONFRONT AND CROSS-EXAMINE THE CHIEF WITNESS AGAINST HIM WOULD TAKE PRECEDENCE OVER DINARDO'S ATTORNEY-CLIENT PRIVILEGE UNDER THE PARTICULAR FACTS OF THIS CASE.

A. The Governing Principles

In denying appellant's motion for production of the letter, the trial court stated that the attorney-client privilege was "inviolate." (RT 769.) The trial court was wrong. As this Court recognized in *Velu* v. *Superior Court* (1989) 208 Cal.App.3d 141, 151, while the attorney-client privilege is entitled to great deference, the privilege must nonetheless yield when it clashes with more compelling Sixth Amendment rights of a criminal defendant to confrontation and cross-examination.

The United States and California Supreme Courts, employing a Fifth Amendment Due Process analysis, have similarly concluded that when a statutory privilege and a criminal defendant's right to a fair trial conflict, the court must weigh the competing interests and strike the balance in favor of the more compelling need. If sustaining a personal privilege would thwart a criminal defendant's fundamental right to a fair trial, the privilege must yield. *(Kyles, supra,* 514 U.S. 419; *Pennsylvania* v. *Ritchie* [AOB 126] (1987) 480 U.S. 39; *Bagley, supra,* 473 U.S. 667; *Brady, supra,* 373 U.S. 83, *People* v. *Webb* (1993) 6 Cal.4th 494, 517-518.) Here, for a multitude of reasons, the balance must be struck in appellant's favor, as a matter of law.

The cases have focused their analyses on both the purpose of the Sixth Amendment guarantees, and the materiality of the excluded evidence. With

respect to purpose, the cases emphasize that the right to confront and cross examine witnesses serves more than merely symbolic goals. Its function is to promote reliability and advance the pursuit of truth in criminal trials. Denial or significant diminution of the right to cross-examine calls into question the ultimate integrity of the fact-finding process. Therefore, the right to obtain and utilize material evidence essential to effective cross-examination is broadly construed, and competing interests are subjected to the closest scrutiny. (*Pennsylvania* v. *Ritchie* (1987) 480 U.S. 39, 51, *Lee* v *Illinois* (1986) 476 U.S. 530, *Nixon, supra, 418 U S.* at pp. 708-*709; Chambers* v. *Mississippi* (1973) 410 U.S. 284, 295; *Berger* v. *California* (1969) 393 U.S. 314, 315.) Because privileges, including the attorney-client privilege, act in derogation of the search for truth they are strictly construed, and are allowed only to the extent that they serve a public good which transcends the search for truth embodied in the Sixth Amendment guarantees. (*Nixon, supra,* 418 U.S at p. 710 and fn. 18.)

Evidence is material, for constitutional purposes, if there is a reasonable probability that had the evidence been disclosed [AOB 127] to the defense the result of the trial would have been different. To establish materiality, the defendant is not required to demonstrate by a preponderance of evidence that disclosure would have resulted in his acquittal--either based on reasonable doubt or on belief in his innocence. Nor does materiality depend on the sufficiency of the remaining evidence before the jury. Rather, the question is whether the character of the undisclosed favorable evidence was such that it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" (*Kyles, supra,* 514 U.S. at p. _ [131 Law Ed.2d at p. 506]; *Pennsylvania* v. *Ritchie, supra,* 480 U.S. at p. 57; *Bagley, supra,* 473 U S. at p. 682.)

Application of the necessary weighing process in accordance with these fundamental principles has produced the following results: In *Chambers* v *Mississippi, supra,* 410 U S. 284, 297—where a

witness had confessed to the crime three times and then repudiated the confessions the Court held that a defendant's rights to cross-examination and compulsory process took precedence over state evidentiary rules which prevented a party from impeaching his own witness and which treated declarations against penal interest as inadmissible hearsay. Even though the jury had been made aware of one of the three repudiated confessions, the Court held that this was insufficient to satisfy the constitutional guarantees to full and effective cross-examination and deprived the defendant of adequate opportunity to challenge the witness' renunciation of the written confession.

[AOB 128] In *Davis* v. *Alaska*, *supra*, 415 U.S. 308, the Court held that state confidentiality statutes designed to protect juveniles had to bow to the defendant's right to cross-examine a key witness about his juvenile record and his probation status. Similarly, in *Pennsylvania* v. *Ritchie*, *supra*, 480 U.S. 39, the Court held that the State would have to produce confidential information in its child protective services files, if the defendant could show that the files contained evidence which met the *Bagley* test of materiality.

Most significantly, in *Nixon*, *supra*, the Court held that a presidential claim of privilege had to yield to the greater need for relevant evidence in a criminal prosecution. The Court recognized that the president's claim of privilege with respect to confidential communications with his advisors was of constitutional dimension. (418 U.S. at p. 796.) It noted that the confidentiality of such communications not only carried the same value accorded to the privacy of ordinary citizens, but carried an enhanced value based upon protection of the public interest. As such the communications were entitled to the highest degree of respect from the courts. (418 U.S. at pp. 708, 714.) Nonetheless, the Court held that society's historic commitment to the rule of law required that a generalized claim of even presidential privilege must yield to the specific need

for relevant evidence in a criminal prosecution. (418 U.S. at pp. 708, 712-713.)

[AOB 129]

B. Given The Crucial Nature Of The Evidence, Appellant's Need To Discover The Letter Far Outweighed Dinardo's Desire To Maintain Confidentiality

Assuming, *arguendo*, that Dinardo's letter could be construed to fall within the attorney-client privilege, and that the privilege was not waived, any impartial examination of the materiality of the evidence, in light of the above principles, compels the conclusion that Dinardo's assertion of the privilege had to yield to appellant's greater need for access to the evidence that could have acquitted him. (*Kyles*, *supra*, 514 U.S. at p. ___ [131 Law Ed.2d at p. 506]; *Pennsylvania* v. *Ritchie*, *supra*, 480 U.S. at p. 57; *Bagley*, *supra*, 473 U.S. at p. 682.)

As noted above, and explained in the accompanying habeas corpus petition, the letter was directly exculpatory. It expressly contradicted the version of events which Dinardo told at trial--and at the time of his arrest--with respect to appellant's culpability. Therefore, unless barred by the privilege (Evid. Code, § 954), it was admissible, under California law, both to impeach Dinardo and as independent evidence of appellant's innocence. (Evid. Code, § 1235; *People* v. *Green*, *supra*, 3 Cal.3d at p. 985.) Its credibility was clearly a jury question.

Its materiality under the *Bagley* standard cannot seriously be disputed. If the jury had believed the letter was truthful, they would have had to acquit. Even if the jury had not been convinced [AOB 130] of the letter's truthfulness, it is reasonably probable that the letter would have sufficed to raise a reasonable doubt in the jurors' minds as to Dinardo's veracity and appellant's culpability. Thus, the character of the evidence was clearly such that it could reasonably be taken to put the whole case in such a different light as to undermine confidence in

the verdict." (*Kyles, supra,* 514 U.S. at p. ___ [131 Law Ed 2d at p. 506].)

Dinardo's testimony formed the crux of the People's case. Exclusion of the letter presented Dinardo to the jury in a totally false light. Curtailment of cross-examination was particularly damaging because of the exceptional likelihood of bias created by the deal for leniency. (*DeSantis, supra,* 2 Cal 4th at p. 1220.) Denying appellant access to the letter made a sham of appellant's Fifth and Sixth Amendment rights and a mockery of the search for truth. (*Pennsylvania* v. *Ritchie* (1987) 480 U.S. 39, 51, *Lee* v. *Illinois* (1986) 476 U.S. 530; *United States* v. *Nixon, supra,* 418 U.S at pp. 708-709; *Chambers* v. *Mississippi* (1973) 410 U.S. 284, *295; Berger* v. *California* (1969) 393 U.S 314, 315; *Napue* v *Illinois, supra,* 360 U.S. at p. 269.)

Dinardo could show no competing need to preserve the "privilege" which was comparable to appellant's need for access to the evidence. Dinardo had already been convicted; he could not be put in further jeopardy on the charges. Furthermore, he was about to extricate himself from the consequences of his conviction by testifying against appellant. His deal with the prosecution was not and could not constitutionally have been, contingent on the [AOB 131] People obtaining a conviction as a result of his testimony (*People* v. *Medina, supra,* 41 Cal App.3d at pp. 452-453; *People* v. *Green* (1951) 102 Cal.App 2d 831, 834-835.) The prosecutor was aware of the existence of the letter at the time she consummated the deal with Dinardo and, so far as appears on the record, the deal was not in any way contingent on the letter's being suppressed. The prosecutor asked only for a copy of the letter in the event that appellant obtained a copy. (RT 702.)

Dinardo's situation is diametrically opposed to that of the defendant in *People* v. *Godlewski.* (1993) 17 Cal.App.4th 940 (*"Godlewski"*) where Division 4 of this Court upheld a claim of attorney-client privilege against a due process challenge. Comparison of the facts in *Godlewski* demonstrates, by negative

example, why the privilege must yield in the present case.

Godlewski and a codefendant were tried jointly for murder. An issue was presented as to which one was the actual killer. Godlewski had made a statement to his own attorney in the jailhouse lockup which was overheard by another inmate.[65] The codefendant attempted to introduce the statement through the inmate's testimony. In sustaining the claim of attorney-client privilege, the Court cited the following factors: First, the intrinsic probative value of the proffered evidence was less than clear and substantial, because the statement did not constitute an [AOB 132] affirmative admission of guilt, but could reasonably be interpreted as just a discussion of trial strategy by Godlewski and his lawyer.[66] (17 Cal.App.4th at pp. 948, 950.) Here, by contrast, the Dinardo letter affirmatively exculpates appellant.[67]

Second, there were two other witnesses in *Godlewski* who testified to statements made to them that were substantially the same as the overheard statement to the attorney. Additionally, the codefendant testified in his own behalf and recounted a purported conversation with Godlewski in which the latter confessed that he committed the homicide accidentally. (17 Cal.App.4th at p. 950.) Here, apart

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[65] The statement was ruled privileged, despite being overheard, because the conditions in the jail prevented greater privacy through no fault of the client. (17 Cal.App.4th at p. 944, fn. 25.)

[66] Although the *Godlewski* Court sustained the attorney-client privilege, it disclosed the contents of the proffered statement in the opinion to illuminate the rationale for its decision. (17 Cal.App.4th at p. 944.)

[67] Additionally, appellant would also note that the excluded evidence in *Godlewski* was of limited probative value. It was multiple hearsay, dependent on the credibility of a jailhouse inmate, a notoriously suspect class of witness, and thus of limited reliability. Here the statement was in Dinardo's own handwriting, and delivered to his attorney, someone he would not be expected to deceive.

from Dinardo's letter, there was no evidence exculpating appellant, nor was there any directly inconsistent prior statement by which Dinardo could be impeached

Finally, the Court cited the fact that Godlewski and the codefendant were being tried jointly, and the key issue was which of them was the actual killer The Court strongly suggested that it might have reached a different result if the codefendant had [AOB 133] already pleaded guilty. (17 Cal.App.4th at p. 948.)[68] Here Dinardo had already been convicted on an aiding and abetting theory. There was nothing in the letter which suggested otherwise. The letter dealt only with the question of appellant's culpability.

The result of the requisite weighing process (*Vela* v. *Superior Court, supra,* 208 Cal.App.3d at p. 151) is that appellant's ability to defend against the charges effectively hinged on his obtaining access to the letter; whereas, the only "negative consequence" that Dinardo would have "suffered" by disclosure of the letter was that he would have been subjected to effective cross-examination. As is shown in the next section, that is not a consequence he had any legal right to avoid Dinardo was asserting a bare generalized claim which could not take precedence over appellant's specific, imperative need for the evidence to defend against the charges. (*Nixon, supra,* 418 U.S at pp. 712-713.)

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[68] In addition to being factually indistinguishable, *Godlewski's* legal underpinnings are somewhat suspect. The case does not discuss, or cite, *Brady, Bagley* or *Nixon,* and it antedates *Kyles.*

C. Dinardo's Assertion Of His Attorney-Client Privilege With Respect To The Letter Is Analogous To The Defendant's Unsuccessful Assertion Of His Miranda Rights In Harris v. New York And Should Be Resolved Similarly

[AOB 134]

An instructive analogy may be drawn between Dinardo's assertion of his attorney-client privilege with respect to the letter and the defendant's assertion of his *Miranda*[69] rights in *Harris* v *New York* (1971) 401 U.S. 222 *("Harris")*. In *Harris*, the prosecution acknowledged that a statement obtained from the defendant violated his *Miranda* rights. Consequently, the State made no attempt to introduce the statement during their case in chief However, when the defendant took the stand and testified in a manner inconsistent with the statement he gave police, the prosecution was allowed to impeach him with the earlier inconsistent statement.

Ruling that the evidence was properly admissible, the Supreme Court made the following observations which are equally relevant to Dinardo's situation While every criminal defendant has a constitutional right to testify in his own defense, or to refuse to do so, this privilege cannot be construed to include the right to commit perjury If he chooses to testify voluntarily, he must do so truthfully, and may be subjected to traditional techniques of impeachment, including use of prior inconsistent statements. The Miranda shield could not "be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (401 U.S at p. 225-226.)

The same considerations apply with equal force to Dinardo's situation. The letter--whether privileged or not--stands on no [AOB 135] higher plane than Harris' *unMirandized* statements. Dinardo's decision

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[69] *Miranda* v *Arizona* (1966) 384 U.S 436

to testify in accordance with his earlier statements to police, in exchange for the "deal," did not confer either on him or on the prosecution the right to present their version of the facts to the jury in the misleading light cast by suppression of Dinardo's prior inconsistent statement exculpating appellant.

Even if Dinardo's attorney-client privilege were accorded constitutional status, "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth"--or an out and out falsehood (*United States* v. *Nobles* (1975) 422 U.S. 225, 241.)

D. Suppression Of The Letter Was Prejudicial As A Matter Of Law

Kyles holds that once a reviewing court, applying the *Bagley* test of materiality, has found constitutional error in the exclusion of the evidence, there is no need for further harmless error review. *Kyles* finds this conclusion inescapable: *Bagley* error cannot be treated as harmless, because it is based on a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. (514 U.S. at p _ [131 L.Ed.2d at p. 507].)

The Court also noted, however, that the "unscathed" evidence [AOB 136] in *Kyles*, by the State's own admission, hardly amounted to overwhelming proof of guilt. (514 U.S at p [131 L.Ed.2d at p. 516].) Such was obviously the case here as well. Both the trial court (DRT 775) and the prosecutor (SRT 1281) doubted that the jury would have convicted appellant without Dinardo's testimony. The letter was the only real piece of evidence which impeached Dinardo or exculpated appellant, and it did both.

Fuller's assertion, when he first resisted production, that he did not believe the contents of the letter to be truthful (RT 728), like his later comments

at the resentencing hearing that he thought Dinardo had testified truthfully at trial (SRT 1283), are entitled to no weight in assessing prejudice. As *Kyles* held, the criminal trial is the chosen forum for ascertaining the truth about criminal accusations, not "the prosecutor's private deliberations," or the self-serving statements of counsel for an adverse witness with a biased stake in the proceedings. (514 U.S at p. __ [131 L.Ed.2d at p. 509])

Disclosure of the letter would have resulted "in a markedly weaker case for the prosecution and a markedly stronger one for the defense." (Kyles, *supra,* 514 U.S. at p. [131 L.Ed.2d at p 510].) Hence, the importance of the letter cannot be overstated. Whether measured by the *Kyles-Bagley* standard or the reasonable doubt standard (*Chapman* v. *California, supra,* 386 U.S. at p. 24), suppression of the letter was overwhelmingly prejudicial.

SUPPLEMENTAL APPENDIX C

FILED
MAY 20 1997

CONSOLIDATION WITH PENDING APPEAL REQUESTED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION

IN re CHARLES FRANKLIN MURDOCH, JR

2d Crim. B1_____

Petitioner,

On Habeas Corpus

(Related Appeal Pending,
2d Crim B100877,
Division Three)

PETITION FOR WRIT OF HABEAS CORPUS
[WITH ATTACHED EXHIBITS]

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TABLE OF CONTENTS

	Page
PETITION	1
PRAYER	12
VERIFICATION	13
MEMORANDUM OF POINTS AND AUTHORITIES	14
I. HABEAS CORPUS IS THE APPROPRIATE REMEDY WHEN A DEFENDANT'S CLAIM OF A DENIAL OF FIFTH OR SIXTH AMENDMENT RIGHTS CAN BEST BE DEMONSTRATED BY EVIDENCE OUTSIDE THE RECORD ON APPEAL	14
II. THE QUESTION OF WHETHER THE DINARDO LETTER IS, OR EVER WAS, PRIVILEGED IS PROPERLY BEFORE THIS COURT ON APPEAL AND ON HABEAS CORPUS	15
III. THE RECORD ESTABLISHES AS A HATTER OF LAW THAT THE LETTER WAS NEVER PRIVILEGED	17
IV. EVEN IF THE LETTER HAD ONCE BEEN PRIVILEGED DINARDO WAIVED THE PRIVILEGE BY PARTIAL ORAL DISCLOSURE OF ITS CONTENTS TO THE PROSECUTOR	19

[HC Pet 21] VI.

ASSUMING, ARGUENDO, THAT THE LETTER WAS EVER PRIVILEGED, PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS TAKE PRECEDENCE OVER DINARDO'S PRIVILEGE UNDER THE PARTICULAR FACTS OF THIS CASE.

As set forth at length in the Appellant's Opening Brief (AOB 125-132), a witness' attorney-client privilege must yield when it clashes with the defendant's more compelling rights to cross-examination and to fundamental due process. (*Kyles* v. *Whitley* (1995) 514 U.S. 419 [131 L. Ed.2d 490]; *Pennsylvania* v. *Ritchie* (1987) 480 U.S. 39; *Vela* v *Superior Court* (1989) 208 Cal.App.3d 141, 151.)

Here, the letter was crucial not only to impeach Dinardo, the crucial prosecution witness, but as affirmative proof of petitioner's innocence. There was no other exculpatory evidence available to petitioner to refute 12 year old charges. Hence suppression of the letter deprived petitioner of fundamental due process. (*Brady* v. *Maryland, supra,* 373 U.S. 83.)

Additionally, suppression of the letter effectively deprived petitioner of his Sixth Amendment right to cross-examine an especially biased witness, testifying under an unlawfully generous grant of leniency, about the key issue of guilt or innocence. (*People* v. *DeSantis* (1992) 2 Cal.4th 1198; *Vela* v *Superior court, supra,* 208 Cal.App.3d at p. 151.)

[HC Pet. 22]

Application of the balancing test enunciated by the Supreme Court in *Kyles* v. *Whitley, supra,* 514 U.S. 419 [131 L. Ed 2d 490] compells the conclusion that petitioner's need for the evidence outweighed Dinardo's need for confidentiality.

Moreover, Dinardo had no right to testify under a false cloak of credibility, shielded from his prior

inconsistent statements. (Cf. *Harris* v. *New York* (1971) 401 U.S. 222; AOB 133 135.)

For the reasons set forth herein and in the accompanying Appellant's Opening Brief (2d Crim. B100877), it was prejudicial error to suppress the letter.

No. 10-809

IN THE

Supreme Court of the United States

CHARLES FRANKLIN MURDOCH, JR., *Petitioner*,

v.

ROY CASTRO, WARDEN, AND
EDMUND G. BROWN, JR., ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA, *Respondents*.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

REPLY TO THE STATE'S ARGUMENTS 1

I. AEDPA DEFERENCE 1

A. *Richter* Vindicates Judge Kozinski's Dissent 1

B. Certiorari Is Appropriate Regarding the Application of *Richter*'s "More Likely Explanation" Standard 6

II. THE MERITS OF THE CONFRONTATION CLAUSE CLAIM 9

A. The Superior Court Restricted the Scope of Cross-Examination 9

B. The Ninth Circuit's Analysis Was Not Limited to the Attorney-Client Privilege 11

C. The Error Was Prejudicial 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Canaan v. McBride,
395 F.3d 376 (7th Cir. 2005).....6

Carey v. Musladin, 549 U.S. 70 (2006).....11

Davis v. Alaska, 415 U.S. 308 (1974).....12

Fry v. Pliler, 551 U.S. 112 (2007).....12

Giglio v. United States,
405 U.S. 150 (1972).....10

Harrington v. Richter,
131 S. Ct. 770 (2011).....passim

In re Mazoros,
142 Cal. Rptr. 609 (Ct. App. 1977).....2

Lyell v. Renico,
470 F.3d 1177 (6th Cir. 2006).....6, 7, 8

Murdoch v. Castro,
489 F.3d 1063 (9th Cir. 2007).....11

Murdoch v. Castro,
546 F.3d 1051 (9th Cir. 2008).....11

Norde v. Keane,
294 F.3d 401 (2d Cir. 2002).....6

Pennsylvania v. Ritchie,
480 U.S. 39 (1987).....9, 10, 11

People v. Godlewski,
21 Cal. Rptr. 2d 796 (Ct. App. 1993).....4, 7, 8

TABLE OF AUTHORITIES (Continued)

Page

People v. King,
72 Cal. Rptr. 478 (Ct. App. 1968) 10

People v. Mincey, 827 P.2d 388 (Cal. 1992) 3, 7

People v. Durrant, 48 P. 75 (Cal. 1897) 9

Pirtle v. Morgan,
313 F.3d 1160 (9th Cir. 2002 ..... 4, 5

Pham v. Terhune,
400 F.3d 740 (9th Cir.2005) 4

Reynoso v. Giurbino,
462 F.3d 1099 (9th Cir. 2006) 4, 5

Shelton v. Purkett,
563 F.3d 404 (8th Cir. 2009) 6, 7

Showers v. Bears,
635 F.3d 625 (3d Cir. 2011) 10

Swidler & Berlin v. United States,
524 U.S. 399 (1998) 7, 11

Vela v. Superior Court,
255 Cal. Rptr. 921 (Ct. App. 1989) 3, 7, 8

STATUTES AND RULES

28 U.S.C. § 2254 ..... passim

Cal. Const. art. VI, § 14 2

Cal. Evid. Code § 952 9

REPLY TO THE STATE'S ARGUMENTS

I. AEDPA DEFERENCE

A. *Richter* Vindicates Judge Kozinski's Dissent

The State quotes only the first paragraph of the relevant five-paragraph holding in *Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011). The subsequent four paragraphs demonstrate that the Ninth Circuit applied an incorrect legal standard.

The petitioner in *Richter* filed his original habeas corpus petition with the California Supreme Court, 131 S. Ct. at 783, bypassing the California Court of Appeal. He received only a one-page denial. Relying on the principles of federalism underlying the AEDPA, *Richter* rejected the contention that the California Supreme Court needed to state its reasons in denying the 3,400 original habeas petitions on which it rules each year. "[R]equiring a statement of reasons could undercut state practices designed to preserve the integrity of the case-law tradition. The issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed." *Id.* at 784. Only "the California courts or Legislature," not the federal courts, could "alter the State's practices or elaborate more fully on their import." *Id.* at 785.

But *Richter* clarified that the AEDPA permits a petitioner to obtain *de novo* review if he can affirmatively demonstrate that the state court failed to adjudicate his claim on the merits. Although "it may be presumed that the state court adjudicated

the claim on the merits in the absence of any indication or state-law procedural principles to the contrary," this "presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." 131 S. Ct. at 784-85.

Richter thus vindicates Judge Kozinski's dissent in this case. The Court of Appeal's opinion, which addressed both Murdoch's direct appeal and his habeas petition, App. 98, was subject to the requirement that "[d]ecisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." Cal. Const. art. VI, § 14.[1] Although "something as concise as 'Defendant's remaining contentions do not merit discussion' will suffice . . . " *something* must be said to indicate that the court is aware of the remaining issues and has resolved, rather than overlooked, them. App. 38 (citing *Lewis v. Superior Court*, 970 P.2d 872 (Cal. 1999); *People v. Rojas*, 173 Cal. Rptr. 64 (Ct. App.1981)) (emphasis in original). This "state-law procedural principle[]," *Richter*, 131 S. Ct. at 784, aids Murdoch in overcoming the AEDPA presumption.

Although the Court of Appeal did not need to affirmatively cite and distinguish Murdoch's cited authorities, *Lewis*, 970 P.2d at 894, the strength of

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[1] By contrast, because the California Supreme Court in *Richter* denied the petition without issuing an order to show cause or alternative writ, that petition did not trigger Cal. Const. art. VI, § 14. *See In re Mazoros*, 142 Cal. Rptr. 609, 610 (Ct. App. 1977).

Murdoch's claim under existing California and federal cases indicates that the Court of Appeal simply missed the claim. App. 36-41.

The State's strategy of ignoring the Confrontation Clause issue carried the day in the Court of Appeal. "If you wonder how this could have happened, just read the state's response brief in the court of appeal. Like the court of appeal's opinion, it cites neither *Vela* nor *Mincey*." App. 37. "The state nowhere engages Murdoch's Sixth Amendment claim or so much as mentions his Confrontation Clause arguments about the letter." *Id.*

The plurality responded that "[w]hether the state court adequately responded to Murdoch's Confrontation Clause argument, however, is irrelevant," and that AEDPA deference automatically applies unless a state court "clearly indicated that it had not reached the merits of [the] claim." App. 16.

The State insists, however, that Murdoch has taken this quote out of context. A review of the relevant footnote in its entirety, however, shows that the plurality merely acknowledged the State's and Judge Kozinski's competing readings of the Court of Appeal's decision:

> The California Court of Appeal, which rendered the last reasoned state court decision in this case, addressed Murdoch's Confrontation Clause argument only obliquely. It did not mention the Confrontation Clause in its opinion, but it did discuss and quote

from the section of Murdoch's brief in which he raised the issue. The court also quoted from *People v. Godlewski*, 17 Cal. App. 4th 940, 21 Cal. Rptr. 2d 796, 800 (1993), a case that dealt with the tension between the attorney-client privilege and the Confrontation Clause. Whether the state court adequately responded to Murdoch's Confrontation Clause argument, however, is irrelevant. Even when there is no reasoned state court opinion explaining the denial of a defendant's claim in any respect, we "must assume that the state court has decided all the issues and 'perform an independent review of the record to ascertain whether the state court decision was objectively reasonable.'" [*Reynoso v. Giurbino*, 462 F.3d 1099, 1109 (9th Cir. 2006)] (quoting *Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir.2005) (per curiam)) (internal quotation marks omitted). Thus we do not review Murdoch's claim de novo, as we would if the state court had clearly indicated that it had not reached the merits of Murdoch's claim. *See id.*; [*Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002).]

The dissent refuses to accept these established principles of AEDPA review. Instead, it spends several pages discussing the state appellate court's

> duty under state law to "analyze[ ] ... [each] contention" and convinces itself that the state court erroneously "decline[d] to reach [the] issue" and "overlooked" it. *See* Diss. op. at 999-1001. But whether we review a claim de novo under the AEDPA is a question of federal law and, on that question, as explained above, we are bound by *Reynoso* and *Pirtle*.

App. 16.[2]

Rather than accept the State's reading of the Court of Appeal's decision, the plurality relied on authority regarding the standard of review "when there is no reasoned state court opinion explaining the denial of a defendant's claim in any respect." *Id.* Unable to deny that the Ninth Circuit is "the only court in the country to hold that a state court may adjudicate a constitutional claim 'on the merits' by overlooking it," App. 60, the plurality concluded that Ninth Circuit law mandated this approach.

By treating the AEDPA presumption as irrebuttable, except by an express statement declining to address the federal claim, the Ninth Circuit applied the wrong legal standard. The assumption is rebuttable under *Richter*. Certiorari is necessary to address this published misstatement of the law.

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[2] Only three members of the panel accepted the State's argument regarding *Godlewski*. App. 68. Murdoch addresses the merits of that argument in the next section.

B. Certiorari Is Appropriate Regarding the Application of *Richter*'s "More Likely Explanation" Standard

In any event, certiorari is appropriate regarding the application of *Richter*. Murdoch need only show that his "explanation for the state court's decision is more likely," 131 S. Ct. at 784-85, not correct beyond reasonable doubt. Because the petitioner in *Richter* offered "pure speculation," *id.* at 785, that decision provides little guidance regarding the quantum of evidence that would be sufficient.

The Sixth Circuit, for instance, held *de novo* review to be appropriate where the petitioner raised the same issues regarding jury polling and judicial bias under both federal and state law, but the state court "addressed [the] claims only in state-law terms in its decision." *Lyell v. Renico*, 470 F.3d 1177, 1182 (6th Cir. 2006). This holding is directly contrary to the State's argument.

Applying a burden similar to *Lyell*, the Seventh Circuit applied *de novo* review where the Indiana courts addressed only the claim that his counsel was ineffective for failing to call him as a witness in his own defense, while missing the nuance that the petitioner also asserted that his counsel was ineffective for failing to consult with him on the issue. *Canaan v. McBride*, 395 F.3d 376, 381-82 (7th Cir. 2005) (Wood, J.). *See also Norde v. Keane*, 294 F.3d 401, 410 (2d Cir. 2002) (opinion lacked general language that remaining issues considered and rejected); *Shelton v. Purkett*, 563 F.3d 404, 409 (8th

Cir. 2009) (petitioner given "benefit of the doubt" where opinion susceptible to conflicting inferences).

If the Ninth Circuit accepted the State's reading of the Court of Appeal's decision, its holding directly conflicts with *Lyell*, 470 F.3d at 1182. And, as Judge Kozinsky details, such an interpretation would place a far greater burden on the petitioner than has any other court. The record demonstrates that the Court of Appeal overlooked Murdoch's Confrontation Clause claim: the State simply ignored the issue in its response brief; the opinion addressed Murdoch's every other contention in detail; the opinion discussed the letter and *Godlewski* only in the context of state-law claims; and the federal claim found strong support in *People v. Mincey*, 827 P.2d 388, 422 (Cal. 1992), *Vela v. Superior Court*, 255 Cal. Rptr. 921, 926 (Ct. App. 1989), and decisions of this Court. App. 36-41. Further, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), the decision allegedly creating ambiguity in this Court's Confrontation Clause jurisprudence, postdated the Court of Appeal's decision.

The State responds, however, that the Court of Appeal adjudicated the Confrontation Clause claim by citing, amidst a discussion of state-law privilege questions, "the section of [*Godlewski*] that dealt with that federal issue." Opp. Br., at 12. Such an interpretation of *Richter*'s "more likely explanation" standard strains credulity. Just as petitioner cannot employ pure speculation to meet his burden under *Richter*, the State cannot invoke AEDPA deference by scouring the authorities cited in the Court of

Appeal's decision for unstated grounds on which it could have ruled.

Moreover, *Godlewski* was far from dispositive of Murdoch's federal claim. In that case, one defendant, Flack, sought to pierce the attorney-client privilege of his codefendant, Godlewski, to introduce "statements made by Godlewski to his lawyer" allegedly constituting "an admission by Godlewski that he (Godlewski), not Flack, actually committed the murder." 21 Cal. Rptr. 2d at 797. The court declined to invade Godlewski's own federal right to effective assistance of counsel. *Id.* at 799. The court distinguished *Vela*, which "had no reason to even consider the extent to which such disclosure could impact upon a codefendant's constitutional right to competent representation." *Id.* at 801 n.27. It further distinguished authorities that "involved an attempt to breach the attorney-client privilege held by an accomplice who had already pled guilty; at bench, Flack seeks to penetrate the confidential attorney-client relationship of a codefendant who is being jointly tried." *Id.* at 801. By its express terms, *Godlewski* was easily distinguishable as involving a conflict between the federal constitutional rights of two codefendants being jointly tried.

To accept the State's argument would be to raise Murdoch's burden well above *Richter*'s "more likely explanation" standard. Given that this issue has arisen in five different Circuits in recent years, with the Sixth Circuit's *Lyell* decision directly contravening the State's argument here, this Court should grant certiorari to address the application of the *Richter* burden.

II. THE MERITS OF THE CONFRONTATION CLAUSE CLAIM

A. The Superior Court Restricted the Scope of Cross-Examination

All members of the en banc panel agreed that the Superior Court's ruling restricted cross-examination. App. 7 ("The court concluded that Dinardo's letter . . . was protected by the attorney-client privilege and thus could not be used, on cross-examination, to impeach Dinardo."); App. 29-30, 68. Yet the State contends "'the trial court placed no limitation on the scope of cross-examination.'" Opp. Br., at 19 (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 45 (1987)), and that preservation of Murdoch's Confrontation Clause claim required that he attempt to cross-examine Dinardo to elicit the substance of that communication.

But the attorney-client privilege protects the "information" that the client transmits in confidence to his attorney. Cal. Evid. Code § 952. The information at issue was that Dinardo had made a prior inconsistent statement that was exculpatory in nature.

In California, as in all jurisdictions, a party may question a witness regarding the circumstances of an attorney-client communication, to determine whether the privilege applies, but questioning regarding the substance of the communication is permissible only after the trial court finds the privilege inapplicable or waived. *People v. Durrant*, 48 P. 75, 86 (Cal. 1897). The Superior Court, upon review of Dinardo's letter, ruled: "I see no exception

to the attorney-client privilege, in my opinion, it's inviolate insofar as these facts are concerned." Opp. Br., App. 30.

This ruling gave Murdoch no option or opportunity to elicit this prior inconsistent statement from Dinardo on cross-examination, with or without the letter. Indeed, it is "misconduct" for an attorney "to ask questions calling for inadmissible and prejudicial answers." *People v. King*, 72 Cal. Rptr. 478, 495 (Ct. App. 1968).

Thus, Murdoch does not seek to establish a right of pretrial discovery in contravention of *Ritchie*. Dinardo was on the stand, and the prosecutor complied with her obligation under *Giglio v. United States*, 405 U.S. 150, 153-55 (1972),[3] to inform the court and Murdoch of the prior inconsistent statement that "Dinardo was coerced by the police into implicating defendant Murdoch." Opp. Br., App. 1. At that point, the question became not one of pretrial discovery, or of prosecutorial disclosure, but of the scope of cross-examination that the Superior Court would permit. The Superior Court's ruling

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[3] The State mischaracterizes the Petition as raising a new *Brady* claim on appeal. Murdoch cited *Giglio* precisely to illustrate that the appeal turns not on *Brady* disclosure issues but on court-imposed restrictions on cross-examination. The State was the party, if any, to waive its argument. It has never contended that Murdoch needed to conduct further questioning to preserve his Confrontation Clause claim. *Showers v. Beard*, 635 F.3d 625 (3d Cir. 2011) (state "waived its procedural default argument, raising this issue for the first time after over a decade of post conviction litigation").

restricted the scope of cross-examination in violation of *Ritchie*.

B. The Ninth Circuit's Analysis Was Not Limited to the Attorney-Client Privilege

Although the State stresses the special importance of the attorney-client privilege, the Ninth Circuit relied principally: (1) on Eighth Circuit authority regarding the physician-patient privilege; and (2) on a footnote in *Swidler*, 524 U.S. at 409 n.3, acknowledging the law firm's concession that a criminal defendant's constitutional rights could warrant breaching the privilege.

This argument illustrates that the stakes are not limited to the attorney-client privilege. By the logic of the Eighth and Ninth Circuits, each time that this Court expressly declines to reach an issue—even a conceded issue regarding clearly established federal law—the resulting dicta could create ambiguity precluding federal review on that point under the AEDPA.

The Court should grant certiorari to clarify that the *Swidler* dicta, which should play no role in the AEDPA analysis, *Carey v. Musladin*, 549 U.S. 70, 74 (2006), did not open the door to state-law privileges trumping federal constitutional rights under the Supremacy Clause.

C. The Error Was Prejudicial

The en banc Ninth Circuit never reached the question of whether the error was harmless or prejudicial. *See Murdoch v. Castro*, 546 F.3d 1051, 1051 (9th Cir. 2008), *vacating* 489 F.3d 1063 (9th

Cir. 2007). If this Court finds a violation of Murdoch's Confrontation Clause rights, the Court may either reach the question of prejudice or remand for further consideration.

The State is correct that this Court recently clarified that the appropriate test on collateral review is whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Fry v. Pliler*, 551 U.S. 112, 116 (2007). But Murdoch is plainly entitled to relief under the "substantial and injurious effect" test.

No forensic evidence pointed to Murdoch. App. 4. The identification witnesses were Dinardo and a bartender who first identified Murdoch 11 years after the crime. App. 4, 7. The bartender "was shown Murdoch's picture in a photo array immediately after the robbery and didn't recognize him. More than a dozen years later, she points to the only defendant in the courtroom and is sure it's him. Weak tea." App. 55.

Dinardo's credibility thus was critical to Murdoch's conviction. *Davis v. Alaska*, 415 U.S. 308, 317-18 (1974), found manifest prejudice where the accused could not cross-examine his principal accuser as to matters of general credibility. Here, the excluded evidence specifically contradicted the principal accuser's identification testimony.

The State points to Murdoch's ability to impeach Dinardo by establishing that Dinardo had a prior criminal record, that the possibility of a reduced sentence gave Dinardo a motive to lie, and that Dinardo originally lied to the police about his own

involvement in the crime. But Murdoch had no luck in attempting a direct impeachment of Dinardo's identification of Murdoch, as Dinardo denied that the police had pressured him to implicate Murdoch in the crime. Opp. Br., App. 20-23.

It was one thing for Dinardo to offer a self-interested denial of his own involvement in the crime. It was another thing entirely for him to deny Murdoch's involvement. Notwithstanding the statement by Dinardo's attorney that the letter was unreliable, the "were you lying then or are you lying now" impeachment would have driven home that Dinardo would lie about anything, including Murdoch's guilt or innocence, to suit his purpose at any given time.

Because the error had a substantial and injurious effect or influence in determining the jury's verdict, this Court should direct the issuance of a writ of habeas corpus.

CONCLUSION

The Court should grant the petition for certiorari and vacate or reverse the judgment of the Ninth Circuit.

Respectfully submitted:

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188

(4)

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No. 10-809

IN THE

Supreme Court of the United States

CHARLES FRANKLIN MURDOCH, JR., *Petitioner*,

v.

ROY CASTRO, WARDEN, AND
EDMUND G. BROWN, JR., ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA, *Respondents*.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

PETITION FOR REHEARING 1

1. THE INTERVENING DECISION IN *WILLIAMS V. CAVAZOS* 1

2. APPROPRIATE RELIEF 5

CONCLUSION 6

RULE 44.2 CERTIFICATE 7

TABLE OF AUTHORITIES

Page

CASES

Harrington v. Richter,
131 S. Ct. 770 (2011) ..... *passim*

In re Mazoros,
142 Cal. Rptr. 609 (Ct. App. 1977) 5

Murdoch v. Castro,
609 F.3d 983 (9th Cir. 2010) 3, 4

Williams v. Cavazos,
No. 07-56127, ___ F.3d ___, 2011 WL
1945744 (9th Cir. May 23, 2011) ..... *passim*

CONSTITUTIONAL PROVISIONS

Cal. Const. art. VI, § 14 5

PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Petitioner Charles Franklin Murdoch, Jr. moves this Court for an order (1) vacating its order, entered May 16, 2011, denying his Petition for Certiorari, (2) granting the Petition for Certiorari on Question 1 presented therein, and (3) vacating the judgment of the Ninth Circuit, and remanding for further consideration in light of *Harrington v. Richter*, 131 S. Ct. 770 (2011).

1. THE INTERVENING DECISION IN *WILLIAMS V. CAVAZOS*

Based on an intervening decision of the Ninth Circuit addressing precisely the same question raised at Question 1 of his Petition for Certiorari, Mr. Murdoch reiterates his request that this Court summarily vacate the judgment of the Ninth Circuit and remand for further consideration in light of *Richter*.

One week after the denial of certiorari in this case, the Ninth Circuit published its decision in *Williams v. Cavazos*, No. 07-56127, ___ F.3d ___, 2011 WL 1945744 (9th Cir. May 23, 2011). In *Williams*, the California Court of Appeal had issued a 29-page opinion adjudicating the prisoner's claim that dismissal of a holdout juror violated state law, but the opinion failed to mention the prisoner's federal claim that the very same ruling violated the Sixth Amendment.

Under these facts, *Williams* found *de novo* review to be appropriate under *Richter*:

> It is obvious, not "theoretical" or "speculat[ive]," that Williams's constitutional claim was not adjudicated at all, and so the *Richter* presumption is overcome. [131 S. Ct.] at 785. Specifically, the portion of the court's opinion concerning the discharge of Juror No. 6 reveals that the court upheld his dismissal on the sole basis that the trial court had not abused its discretion in applying section 1089. That the court engaged in an extended discussion of Williams's *statutory* claim, but made no mention whatsoever of her more fundamental *constitutional* claim, is a compelling "indication" that the court either overlooked or disregarded her Sixth Amendment claim entirely, rather than that it adjudicated the claim but offered no explanation at all for its decision. *Cf. id.* at 785. Put differently, when a court simply says "claims denied," and nothing more, we presume the denial is on the merits and as to all claims, *see id.* at 784–785, but when a court devotes many pages to explaining its reason for denying one claim, and then says absolutely nothing that even acknowledges the existence of a second claim, "there is reason to think" that it "is more likely" that the court simply neglected the issue and failed to adjudicate the claim.

Williams, slip op. at 6718.

In arriving at this holding, the *Williams* panel, distinguished the present case in a footnote:

> In contrast, in *Murdoch v. Castro*, 609 F.3d 983 (9th Cir. 2010) (en banc), a plurality of the en banc court determined that the California Court of Appeal had "discuss[ed] and quote[d] from the section of [the petitioner's] brief in which he raised" his federal constitutional claim and had cited a state case that discussed the federal constitutional right. It therefore stated that the state court had adjudicated the petitioner's constitutional claim on the merits, even though it "addressed [the] argument only obliquely." *Id.* at 990 n. 6 (plurality opinion). Unlike in *Murdoch*, here the state court did not address Williams's claim, obliquely or otherwise, and there is not a scintilla of evidence that the Court of Appeal decided the constitutional claim, in addition to a separate claim that it discussed at length. The *Murdoch* court found an "indication" that the state court *had* adjudicated the constitutional claim on the merits; here, the total disparity between the court's treatment in the opinion of Williams's statutory claim (reasoned in detail) and her constitutional claim (not mentioned at all) provides a strong "indication" that

> the claim was never adjudicated on the merits.

Williams, slip op., at 6717 n.10 (emphasis in original).

Although *Murdoch* involved only a plurality decision, the *Williams* panel's efforts to respect and distinguish that plurality opinion—following this Court's denial of certiorari—already have injected mischief into the Ninth Circuit's post-*Richter* AEDPA jurisprudence. *Williams* squared its holding with *Murdoch* by emphasizing the complete absence of evidence of adjudication on the merits in that case, and by emphasizing the existence of some evidence of adjudication in this case.

But that is not *Richter*'s standard. *Richter* directs that the presumption of adjudication "may be overcome when there is reason to think some other explanation for the state court's decision is more likely." 131 S. Ct. at 784-85. The *Williams* panel's discussion of this case elevates the *Richter* burden from "more likely explanation" to "only explanation."

Apparently agreeing that the Ninth Circuit needs to clarify its post-*Richter* AEDPA jurisprudence, the State of California has stated its intent in *Williams* to submit a petition for rehearing with suggestion for rehearing en banc, which "will address, among other things, whether the state court made a merits adjudication for purposes of AEDPA." Appellee's Application for 14-Day Extension of Time to File Pet. for Reh'g, Decl. of Counsel ¶ 3, *Williams v. Cavazos*, No. 07-56127 (9th Cir. filed June 1, 2011).

2. APPROPRIATE RELIEF

There is an easy remedy for this case's muddying of the post-*Richter* waters. The Court can summarily vacate the judgment of the Ninth Circuit, and remand for further consideration in light of *Richter*. Such a summary order would permit the en banc panel below to determine whether its plurality opinion applied an AEDPA standard consistent with *Richter*. Indeed, should the Ninth Circuit grant en banc rehearing in *Williams*, it could consolidate the two appeals for en banc consideration.

Alternatively, this Court could see fit to grant certiorari for plenary review of the AEDPA question. As *Williams* demonstrates, this case presents a recurring fact pattern—where the California Court of Appeal issues a reasoned decision that overlooks, or at least arguably overlooks, a federal claim. This question will recur because Cal. Const. art. VI, § 14 requires that "[d]ecisions of the . . . courts of appeal that determine causes shall be in writing with reasons stated."[1] Given the sheer number of habeas corpus petitions filed in California federal courts, certiorari would be appropriate to resolve this important AEDPA question.

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[1] By contrast, because the California Supreme Court in *Richter* denied the petition without issuing an order to show cause or alternative writ, that petition did not trigger Cal. Const. art. VI, § 14. *See In re Mazoros*, 142 Cal. Rptr. 609, 610 (Ct. App. 1977).

CONCLUSION

The Court should, on rehearing, grant the petition for certiorari, and summarily vacate the judgment of the Ninth Circuit, and remand for further consideration in light of *Richter*. Alternatively, the Court should grant certiorari for plenary review of Question 1 presented in the Petition for Certiorari.

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RULE 44.2 CERTIFICATION OF COUNSEL

Pursuant to Rule 44.2, I hereby certify that this petition for rehearing is restricted to intervening circumstances of a substantial effect. I further certify that this petition for rehearing is presented in good faith and not for delay.

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